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Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996

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COMMENT

DUE PROCESS AND TRUE CONFLICTS: THE CONSTITUTIONAL LIMITS ON EXTRATERRITORIAL FEDERAL LEGISLATION AND THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1996

International commerce and business transactions have become increasingly important as national economies continue to integrate within the global economy.[1] Moreover, the United States has changed its foreign policy tools in response to the end of the Cold War.[2] In the last ten years, the United States has increasingly focused on the use of economic sanctions, embargoes, and threats of private legal action in its courts, as

1. *See* David P. Levine, *Global Interdependence and National Prosperity*, *in* U.S. TRADE POLICY AND GLOBAL GROWTH 37-56 (Robert A. Blecker ed., 1996) (examining the impact of international economic interdependence upon international, regional, and country levels); Souathana Sokhom, *The Trade War of the Twenty-First Century*, *in* INTERNATIONAL TRADE AND THE NEW ECONOMIC ORDER, 111-25 (Raul Moncarz ed., 1995) (discussing the integration of national economies within the context of international trading blocs); Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The* Hartford Fire *Case*, 1993 SUP. CT. REV. 289, 290-93 (explaining how the U.S. economy has become increasingly integrated with, and interdependent upon, other leading national economies in the world economy). *See generally* A.D. NEALE & M.L. STEPHENS, INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION 3-20 (1988) (examining transnational business transactions and the exercise of jurisdiction by U.S. courts); 2 PRESIDENT'S COMM'N ON INDUS. COMPETITIVENESS, GLOBAL COMPETITION: THE NEW REALITY 174-75 (1985) (describing the integration of the United States into the global economy and the effects of increased competition on national trade policy); Symposium, *Interdisciplinary Approaches to International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 595 (1995) (examining the historical development of international economic law and "new theories" in the study of international law in relation to international economic regulation).

2. *See* ORDER AND DISORDER AFTER THE COLD WAR 277-366 (Brad Roberts ed., 1995) (examining international economic relations and evolution of national foreign policies and international businesses after the end of the Cold War); Jeffrey E. Garten, *American Trade Law in a Changing World Economy*, 29 INT'L LAW. 15, 19-21 (1995) (examining the development of "more comprehensive and more complex" U.S. trade law in the post-Cold War international economy).

opposed to threats of nuclear weapons or promises of billions of dollars of economic aid, to achieve long term foreign policy objectives.[3]

Congress has played an important role in this trend by formulating legislation that advances United States foreign policy goals.[4] In particular, Congress may enact legislation that creates subject matter jurisdiction[5]

3. *See* MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE 191-220 (1990) (surveying and analyzing the United States's invocation of economic and trade sanctions); Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1162, 1163-66, 1170-75 (1987) (reviewing international economic sanctions imposed by the United States). Both the President and Congress play roles in the trend towards economic sanctions. *See* Lung-chu Chen, *Constitutional Law and International Law in the United States of America*, 42 AM. J. COMP. L. 453, 475-78, (Supp. 1994) (describing the inter-relationship between presidential and congressional foreign affairs powers); *cf.* Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814 (1989) (examining the role of judicial review in relation to issues that arise between the exercise of foreign affairs powers of both Congress and the executive branch regarding international affairs matters). The president has increasingly resorted to executive orders imposing various restrictions on trade and investment in foreign countries. *See* Carter, *supra*, at 1170 n.22 (reviewing sanctions authorized by the president); Garten, *supra* note 2, at 23-25 (examining the increased powers granted to the president under section 301 of the 1974 Trade Act, which authorizes the president to impose retaliatory trade sanctions against countries whose activities have a negative impact on U.S. trade and foreign policy objectives); *President Clinton Signs into Law Legislation to Punish Foreign Firms Investing in Iran, Libya*, 13 Int'l Trade Rep. (BNA) No. 32, at 1273 (Aug. 7, 1996) (reporting on presidential sanctions against Iran and Libya). The President's power to impose economic sanctions is authorized under the International Emergency Economic Powers Act. *See* 50 U.S.C. §§ 1701-1702 (1994). This act allows the President to declare a "national emergency" in regard to threatened national security or economic and trade interests, and then impose sanctions or restrictions on imports, exports, or commercial transactions. *Id.*

Congress has increasingly interposed itself in the formulation of U.S. foreign policy by enacting legislation which imposes sanctions on foreign entities. *See* Garten, *supra* note 2, at 19-21 (examining the historical trend of increased congressional involvement in formulating American trade policies); *cf.* John Linarelli, *International Trade Relations and Separation of Powers Under the United States Constitution*, 13 DICK. J. INT'L L. 203, 208-22, 225-40 (1995) (examining the tensions between Congress and the president resulting from congressional restrictions of presidential authority in international trade matters).

4. *See* Perez v. Brownell, 356 U.S. 44, 57-58 (1958) (noting that Congress has the power to enact legislation to regulate foreign affairs even though there is no explicit Constitutional grant of such power); Fong Yue Ting v. United States, 149 U.S. 698, 712 (1893) (noting that the foreign affairs power expanded Congress's legislative authority in international relations matters).

The Commerce Clause of the United States Constitution vests Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3; *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 6.3, at 208-10 (5th ed. 1995) (noting that the Supreme Court has recognized Congress's expansion of its implied foreign affairs powers and upheld its involvement in foreign affairs); Chen, *supra* note 3, at 481-90 (describing Congress's foreign affairs powers).

5. *See* Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982) (finding subject matter jurisdiction is derived from Article III of

for United States courts over the extraterritorial activities[6] of foreign nationals, corporations, or sovereign entities.[7] The extraterritorial extension of United States law is becoming a primary method Congress employs to advance United States foreign policy objectives and to protect United States economic interests.[8] In enacting extraterritorial legislation, Congress may ignore or violate principles of international law, provided it articulates a specific intent to do so.[9] Congressional extraterritorial legis-

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the Constitution, which establishes the jurisdiction of the lower federal courts); BLACK'S LAW DICTIONARY 1425 (6th ed. 1990) (defining subject matter jurisdiction as a court's "power to deal with the general subject involved in the action"); *see also* Mark R. Joelson, *Subject Matter Jurisdiction*, 6 INT'L Q. 140, 143-51 (1994) (providing a concise and comprehensive survey of federal subject matter jurisdiction in U.S. courts).

6. *See* BLACK'S LAW DICTIONARY 588 (6th ed. 1990) (defining extraterritorial as "[b]eyond the physical and juridical boundaries of a particular state or country").

7. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."); *see also* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880, 881-84 (1989) (examining the extraterritorial scope of legislation designed to reach criminal conduct outside the territorial limits of the United States).

8. *See* Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11, 14-16 (1987) (reviewing the methodologies utilized to apply United States law abroad); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992) (concluding that the "extraterritorial application of American law has become a potent tool for effectuating American foreign policy"); Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, The Reversal of Institutional Roles, and The Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 304-05 (1996) (discussing the purpose and intent behind the extraterritorial application of U.S. law and concluding that U.S. law is applied extraterritorially when it "serve[s] the national interest of the United States or its corporate actors"); *cf. Increased Use of Extraterritoriality Could Threaten International Business*, 53 Antitrust & Trade Reg. Rep. (BNA) No. 1334, at 532 (Oct. 1, 1987) (examining the increased use of the "effects doctrine" by the international community to justify the application of domestic laws to foreign conduct occurring abroad).

9. *See Arabian Am. Oil*, 499 U.S. at 248 (finding congressional legislation, "unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States" (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949))); Lauritzen v. Larsen, 345 U.S. 571, 578, 579 n.7 (1953) (stating that a finding of congressional intent is required to apply U.S. legislation extraterritorially); Commodities Futures Trading Comm'n v. Nahas, 738 F.2d 487, 495 (D.C. Cir. 1984) ("Federal courts must give effect to a valid, unambiguous congressional mandate, even if such effect would conflict with another nation's laws or violate international law."); United States v. Pinto-Mejia, 720 F.2d 248, 259 (2d Cir. 1983) (examining congressional intent to regulate conduct outside the United States); Pacific Seafarers, Inc. v. Pacific Far E. Line, Inc., 404 F.2d 804, 812 n.20 (D.C. Cir. 1968) (noting U.S. courts have a greater obligation to follow U.S. law that is inconsistent with international law than U.S. law that is inconsistent with the Constitution); United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945) (finding that if Congress intended extraterritorial effect, federal courts could not disregard U.S. law). *But see* The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction

lation, however, cannot disregard the due process constraints of the United States Constitution.[10] Constitutional law considerations override contradictory legislative preferences.[11]

The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996,[12] also referred to as the Helms-Burton Act, is one of the most re-

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. . . ."); Edye v. Robertson, 112 U.S. 580, 599 (1884) (explaining that U.S. courts cannot look beyond U.S. treaties and acts of Congress); Murray v. Schooner Charming Betsy, 6 (2 Cranch) 64, 118 (1804) (noting that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). *See generally* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1986) [hereinafter RESTATEMENT (THIRD)] (explaining when a state may exercise legislative jurisdiction over a non-state resident); LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 298 (1986) (explaining that congressional intent prevails over contrary international law arguments when Congress is explicit); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 5 (1992) ("Congress possesses the power under the Constitution to enact legislation notwithstanding the fact that it violates principles of public and private international law."); Brilmayer & Norchi, *supra* note 8 at 1218-23 (explaining the prevalence of congressional intent over contravening international legal principles and the importance of Constitutional limitations upon congressional extraterritorial legislation).

10. *See* United States v. Thomas, 893 F.2d 1066, 1067-69 (9th Cir. 1990) (explaining that the application of a U.S. statute cannot violate the Due Process Clause of the Fifth Amendment); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 307 (2d Cir. 1981) (finding congressional legislation attempting to link personal jurisdiction to subject matter jurisdiction is limited by the due process clause); Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivanos, 712 F. Supp. 383, 390 (S.D.N.Y. 1989) (stating that Congress cannot "override the constitutional due process constraints underlying personal jurisdiction"); 2 RESTATEMENT (THIRD), *supra* note 9, § 721, at 230-31 (stating that constitutional protections apply to and limit federal foreign affairs action); John A. Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action*, 17 N.Y.U. J. INT'L L. & POL. 287, 300, 310-11 (1985) (explaining that constitutional constraints on government action are equally applicable to the government's foreign affairs powers); *cf.* 1 RESTATEMENT (THIRD), *supra* note 9, § 403(2), at 244-45 (discussing the reasonableness test regarding the exercise of personal jurisdiction over a person or foreign sovereign); Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM J. INT'L L. 805, 807 (1989) ("[T]he Constitution does not exclude or limit the courts' authority in cases or controversies touching on foreign relations. . . . Judicial deference or abstention in such cases may compromise the authority of the federal courts.").

11. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (holding that the Constitution supersedes a congressional enactment that is in opposition to the Constitution); *see also Texas Trading*, 647 F.2d at 307 (noting congressional action is limited by the due process clause); *Walpex Trading*, 712 F. Supp. at 390 (finding constitutional due process constraints restricted Congress's power in drafting the Foreign Sovereign Immunities Act); Brilmayer & Norchi, *supra* note 8, at 1220 ("Constitutional law arguments. . . trump contrary legislative preferences."); *cf.* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 57-58 (1985) (explaining that federal courts have the final determination on whether congressional legislation is constitutional).

12. Act of Mar. 12, 1996, Pub. L. No. 104-114, § 1 *et seq.*, 110 Stat. 785 (to be codified at 22 U.S.C. § 6021 *et seq.*) The primary sponsors of the legislation were Jesse Helms, a Republican Senator from North Carolina and Chairman of the Senate Foreign Relations Committee, and Congressman Dan Burton, a Republican Representative from Indiana

cent examples of extraterritorial legislation.[13] In an effort to promote the downfall of Fidel Castro's communist regime and facilitate Cuba's transition to democracy, this legislation attempts to deter foreign investment in, and foreign trade with Cuba.[14] Title III of the Helms-Burton Act provides the means of deterrence,[15] by broadly imposing civil liability for engaging in commercial activity related to property located in Cuba that

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and Chairman of the House of Representatives International Relations Committee's Subcommittee on the Western Hemisphere. *See* LEADERSHIP DIRECTORIES, INC., CONGRESSIONAL YELLOW BOOK, Fall 1996, at I-71, II-49.

13. For examples of specific extraterritorial legislation, see Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541, 1543 (requiring the president to impose sanctions on foreign companies that invest in the oil and gas industries of Iran or Libya); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1292-93 ("There is extraterritorial Federal jurisdiction. . . over an offense under this section."); Biological Weapons Anti-Terrorism Act of 1989, 18 U.S.C. § 175(a) (1994) ("There is extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States."); Maritime Drug Law Enforcement Act, 46 U.S.C. § 1903(h) (1994) ("This section is intended to reach acts of possession, manufacture, or distribution outside the territorial jurisdiction of the United States.").

14. *See* § 3, 110 Stat. at 788-89; *see also* Department of Justice Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. 24,955 (1996) (noting Title III discourages foreign investment in Cuba).

15. §§ 301-306, 110 Stat. at 814-22. Section 301(11) of Title III states:

> "To deter trafficking in wrongfully confiscated property, United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro's wrongful seizures."

§ 301(11), 110 Stat. at 815; *see infra* notes 36-42 and accompanying text (examining the provisions of Title III).

the Castro regime[16] confiscated from United States citizens[17] and then expropriated and nationalized after it came to power in 1959.[18]

Upon its enactment, the Helms-Burton Act immediately provoked unparalleled hostile reactions from the international community, especially the major trading partners of the United States, including Canada, Mexico, and the European Union.[19] Opponents of this controversial legisla-

16. *See* § 302(a)(1), 110 Stat. at 815. After the Castro regime came to power on January 1, 1959, it began to systematically confiscate and nationalize all commercial businesses in Cuba, including those that were foreign-owned. *See* Matias F. Travieso-Diaz, *Alternative Remedies In A Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. PA. J. INT'L ECON. L. 659, 660-64 (1996) (discussing the history of Cuban expropriations). This process was completed in 1968, but by 1963 almost all significant businesses and industrial plants were expropriated. *See id.* According to the Foreign Claims Settlement Commission of the United States, the total value of expropriated U.S. property in Cuba is estimated at over $1.8 billion. *See* FOREIGN CLAIMS SETTLEMENT COMM'N OF THE UNITED STATES, 1994 ANNUAL REPORT 148 (1994) (reporting the value of property seized in Cuba from 1967 to 1972).

17. *See* § 302(a)(1), 110 Stat. at 814. The term "United States national" also includes Cuban nationals who became naturalized United States citizens after fleeing from Cuba when the Castro regime gained control. *See* § 4(15), 110 Stat. at 791 (defining a United States national as "any United States citizen"). This controversial issue has raised questions regarding the propriety of allowing Cuban exiles who were not American citizens at the time of the expropriations to sue under Title III of Helms-Burton. *See* Louis F. Desloge, *The Great Cuban Embargo Scam: A Little-Known Loophole Will Allow the Richest Exiles to Cash In*, WASH. POST, Mar. 3, 1996, at C1, C4 (describing how Cuban exiles who are now U.S. citizens are allowed to sue under Helms-Burton and explaining the preference for settlement of Title III lawsuits will favor those with the largest claims).

18. *See* § 302(a)(1), 110 Stat. at 815; H.R. CONF. REP. NO. 104-468, at 57 (1996), *reprinted in* 1996 U.S.C.C.A.N. 527, 572 (discussing the applicability of Title III). In response to Castro's confiscations and expropriations, the U.S. Treasury Department issued the Cuban Assets Control regulations (CACR) pursuant to the Trading with the Enemy Act of 1917, 50 U.S.C. §§ 1-44 (1994). *See* 31 C.F.R. 515.101 to 901 (1996). The Trading with the Enemy Act gave the President "broad authority to impose comprehensive embargoes on foreign countries as one means of dealing with both peacetime emergencies and times of war." Regan v. Wald, 468 U.S. 222, 225-26 (1984). Under the CACR, all transactions in property that Cuba or any Cuban national had "any interest of any nature whatsoever" were prohibited. 31 C.F.R. § 515.201(b). The CACR contained one exception to the Cuban embargo, allowing licensing for specified transactions involving U.S.-owned or controlled firms operating in third countries (i.e., foreign subsidiaries of a U.S. parent corporation). *See id.*

In 1992, in an effort to pressure further the Castro regime, Congress passed the Cuban Democracy Act, which nullified this exception and strictly prohibited U.S.-owned or controlled firms operating overseas from transacting in any business related to Cuba. *See* 22 U.S.C. § 6005 (1994); *see also* 31 C.F.R. § 515.559 (implementing the closure of the licensing exception). For a thorough examination of the legal and economic responses of the United States to the Castro regime, see UNITED STATES ECONOMIC MEASURES AGAINST CUBA: PROCEEDINGS IN THE UNITED NATIONS AND INTERNATIONAL LAW ISSUES 85-126 (Michael Krinsky & David Golove, eds. 1993).

19. *See EU Protests Helms-Burton Law, Asks U.S. to Delay Implementation*, 13 Int'l Trade Rep. (BNA) No. 17, at 682-83 (Apr. 24, 1996) (discussing the European Union's submission of a formal protest to the Clinton Administration); *EU Urges European Firms*

tion contend that it violates numerous precepts of international law.[20] Arguing that Helms-Burton violates international law, however, would be a needless expenditure of energy for a foreign defendant in a United States court[21] because the congressional intent for the expansive extrater-

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to Ignore Threat of U.S. Sanctions for Cuba Trade, 13 Int'l Trade Rep. (BNA) No. 28, at 1128 (July 10, 1996) (examining the European Union's campaign to encourage European firms to defy the Helms-Burton Act); U.S. Info. Agency, *U.S. Sanctions Against Cuba: 'Beating a Dead Horse?'* (Apr. 1, 1996) (summarizing the reactions of 25 countries to the enactment of Helms-Burton).

The countries that immediately denounced the Helms-Burton Act and questioned its extraterritorial reach included the "Rio Group" (most Latin American countries), as well as the European Union, India, Japan, Jamaica, Madagascar, Switzerland, Norway, Trinidad and Tobago, Sri Lanka, and Iceland. *See Cuba Renews WTO Attack on U.S. Bill Aimed at Curbing Foreign Investment*, 13 Int'l Trade Rep. (BNA) No. 16, at 647-48 (Apr. 17, 1996) (discussing Cuba's efforts at the World Trade Organization to attack Helms-Burton and garner support from other nations); *see also Central American Leaders Back Canada in Opposition to Helms-Burton Cuba Law*, 13 Int'l Trade Rep. (BNA) No. 21, at 841 (May 22, 1996) (reporting that Nicaragua, Honduras, Guatemala, El Salvador, Costa Rica, and Belize offered some support to Canada in its opposition to Helms-Burton); U.S. Info. Agency, *U.S.-Cuba Tensions: Unhappiness From Allies About Helms-Burton* (Mar. 6, 1996) (reporting on Latin American criticisms of Helms-Burton).

20. *See* Seymour J. Rubin, *Organization of American States: Inter-American Juridical Committee Opinion Examining the U.S. Helms-Burton Act*, 35 I.L.M. 1322, 1334 (1996) (concluding that the Helms-Burton Act does not conform with international law); *European Commission Calls Cuba Bill 'Clear' Violation of International Law*, 13 Int'l Trade Rep. (BNA) No. 10, at 368 (Mar. 6, 1996) (same).

Besides violating international law, both Canada and Mexico maintain that the Helms-Burton Act also violates the North American Free Trade Agreement (NAFTA) and have initiated a complaint, pursuant to dispute settlement mechanisms under Chapter 20 of NAFTA. *See NAFTA Designates Confer on Complaint Against Helms-Burton Under Chapter 20*, 13 Int'l Trade Rep. (BNA) No. 27, at 1093-94 (July 3, 1996); *see also* H. Scott Fairley, *Does the Helms-Burton Act Violate International Law: An Argument in the Affirmative* (June 24, 1996) (text of remarks for presentation at the American Conference Institute Program, "Beyond Cuba: U.S. International Business Restrictions . . . Compliance with *Libertad* and Other Controls. . . ."). *But see Cuban Liberty and Democratic Solidarity Act: Hearings Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 104th Cong. 184 (1995) (statement of Brice M. Clagett, Partner, Covington & Burling) (arguing the United States has a right under international law to protect the property of its citizens and to advance significant national security interests through Helms-Burton, examining the "substantial effect" jurisdiction of international law, and other legal principles, and concluding Helms-Burton is valid under international law); Brice M. Clagett, *Title III of the Helms-Burton Act Is Consistent with International Law*, 90 AM. J. INT'L L. 434, 434-40 (1996) (same).

21. *See* United States v. Davis, 905 F.2d 245, 248 n.1 (9th Cir. 1990) ("International law principles, standing on their own, do not create substantive rights or affirmative defenses for litigants in United States courts."); *id.* at 248 (recognizing only two restrictions upon the extraterritorial reach of congressional legislation: (1) clear intent to give the law extraterritorial effect; and, (2) "that application of the acts in question [do] not violate the due process clause of the fifth amendment.") (citations omitted); *see also* Chua Han Mow v. United States, 730 F.2d 1308, 1312 (9th Cir. 1984) (holding that extraterritorial application of a statute is justified by objective territorial and protective international law principles, and thus, is constitutional); United States v. King, 552 F.2d 833, 851-52 (9th Cir. 1973)

ritorial reach of Helms-Burton could not have been more explicit.[22] Nevertheless, the extraterritorial application of Helms-Burton must comply with constitutional due process requirements for United States courts to exercise personal jurisdiction[23] over foreign defendants.[24]

President Clinton has suspended enforcement of Title III until July 16, 1997 and has signalled his intent to continue to suspend enforcement of Title III for the foreseeable future.[25] Nevertheless, Title III is significant because Congress and the President enacted a law that arguably extends civil liability to foreign individuals and corporations having no connections to the United States.[26] The idea that this kind of legislation could be enacted, let alone enforced, is cause for concern because it signals that Congress and the President are moving to enact increasingly bold extraterritorial measures as foreign policy tools.[27]

(upholding the extraterritorial application of federal law based on the territorial principle); United States v. Cotten, 471 F.2d 744, 749 (9th Cir. 1976) (applying the territorial principle to explain the validity in applying a statute extraterritorially).

22. *See* § 4(8), 110 Stat. at 790 ("The term 'foreign national' means (A) an alien; or (B) any corporation, trust, partnership, or other juridical entity not organized under the laws of the United States, or of any State, the District of Columbia, or any commonwealth, territory, or possession of the United States."); §4(11), 110 Stat. at 790 ("The term 'person' means any person or entity, including any agency or instrumentality of a foreign state."); § 301(10), 110 Stat. at 815 ("The United States Government has an obligation to its citizens to provide protection against wrongful confiscations by foreign nations and their citizens, including the provision of private remedies.").

23. *See* BLACK'S LAW DICTIONARY 1144 (6th ed. 1990) (defining personal jurisdiction as "[t]he power of a court over the person of a defendant").

24. *See infra* notes 105-29 and accompanying text (examining the due process protections afforded foreign defendants under the Due Process Clause of the Fifth Amendment in U.S. federal courts).

Helms-Burton also raises serious separation of powers issues related to the executive and legislative branches. *See* Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 427-30 (1996) (addressing the limits Helms-Burton places upon the foreign affairs powers of the executive branch). This Comment will focus solely on the due process issues raised by the Act and will not address the constitutional separation of powers issues.

25. *See* Thomas W. Lippman, *Clinton Suspends Provisions of Law That Targets Cuba; Move Defuses Spat with Major U.S. Allies*, WASH. POST, Jan. 4, 1997, at A1.

Under section 306(b) of the Act, the president has the authority to suspend Title III for six month increments. *See* § 306(b), 110 Stat. at 821. To suspend Title III, the President must make a showing that a "suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." *Id.*; *see also* Department of Justice, Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. 24,955, 24,957 (1996) (explaining the six month suspension mechanism).

26. *See infra* notes 158-69 and accompanying text (explaining the expansive extraterritorial reach of the Act).

27. *See supra* note 13 (discussing examples of recent U.S. extraterritorial legislation).

This Comment examines the potential constitutional limitations of the Helms-Burton Act. Specifically, this Comment provides a practical analysis of the due process issues raised by the application of Title III of Helms-Burton upon foreign defendants and suggests a different analytical framework to be used in determining the limitations of overly broad extraterritorial federal legislation. Part One will briefly examine the purposes of the Helms-Burton Act and provide an overview of the provisions of Title III. Part Two will examine the evolution of the legal standards United States courts developed to address jurisdictional and due process issues raised by the extraterritorial application of United States law. Focusing on the complications created by the Act's overly broad language, Part Three analyzes the constitutional limitations on the extraterritorial application of Helms-Burton to foreign defendants. In Part Four, this Comment suggests that United States courts should rigorously employ existing United States due process and jurisdictional principles, as opposed to international law principles, to determine the limitations on overly broad extraterritorial federal legislation.

This Comment suggests that courts may use international comity considerations when defining the boundaries of intended extraterritorial jurisdiction. As a threshold determination, United States courts should weigh international comity concerns within the framework of a new effects analysis to determine whether the exercise of extraterritorial subject matter jurisdiction is valid, even when congressional intent for extraterritorial application is clear. Alternatively, international comity considerations should be addressed within a court's personal jurisdiction analysis. This Comment concludes that if Title III of Helms-Burton, or similar overly broad extraterritorial legislation, is enforced, the United States Supreme Court may have the opportunity to develop a coherent analytical framework to determine jurisdictional and due process limitations on extraterritorial legislation.

I. BACKGROUND: THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1996—AN OVERVIEW

The Helms-Burton Act codifies the existing embargo of the United States against Cuba,[28] permits the revocation of visas of the executives of

28. *See* § 102, 110 Stat. at 792-94. Title I of Helms-Burton, entitled "Strengthening International Sanctions Against the Castro Government," codifies and strengthens existing executive orders and regulations related to the U.S. embargo against Cuba. *See* § 101-116, 110 Stat. at 791-805. Specifically, Title I reaffirms the Cuban Democracy Act of 1992, which calls for the President to "encourage foreign countries to restrict trade and credit relations with Cuba," and it also calls for full enforcement of the Cuban Assets Control Regulations, codified at 31 C.F.R. 515. § 102(a)(1), (c), (h), 110 Stat. at 792, 794. Title I

companies engaged in commercial activities that violate the Act,[29] and creates a process for the United States to provide economic aid to Cuba once the Castro regime no longer governs and the country begins its transition into a democracy.[30] In enacting the Helms-Burton Act, Congress sought to encourage the downfall of the Castro regime and to facilitate Cuba's transition to democracy.[31] A controversial endeavor, Helms-Burton languished in Congress for over a year and a half,[32] until Cuban mili-

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also amends the Trading with the Enemy Act to allow the Secretary of the Treasury to impose civil penalties, not to exceed $50,000, "on any person who violates any license, order, rule, or regulation issued in compliance with the provisions of this Act." § 102(d)(1), 110 Stat. at 793. Section 103 of Title I prohibits U.S. firms, U.S. nationals, and permanent resident aliens from knowingly extending any loan or other type of financing to any person for the purpose of directly or indirectly financing transactions involving confiscated property that is subject to a claim of ownership by a U.S. national. *See* § 103(a), 110 Stat. at 794. Title I also requires the President to submit a report on foreign nations' commerce with and assistance to Cuba. *See* § 108, 110 Stat. at 798-99.

Title II, entitled "Assistance to a Free and Independent Cuba," restricts the President and executive branch from circumventing the Act's provisions through executive orders or other means available to the executive branch. Specifically, Title II denies all members of the executive branch the power to change or lift the embargo by allowing Congress to enact a joint resolution to invalidate any such executive act. *See* § 204(e), 110 Stat. 794, 810-11.

29. *See* § 401(a)(3), 110 Stat. at 822. Title IV of Helms-Burton, entitled "Exclusion of Certain Aliens," also allows the State Department to deny U.S. visas to any person that traffics in expropriated property. *See id.* This exclusion extends to the alien's spouse and minor children. *See* § 401(a)(4). For enforcement guidance, see Department of State, Guidelines Implementing Title IV of the Cuban Liberty and Solidarity Act, 61 Fed. Reg. 30,655, 30,655 to 30,656 (1996).

The State Department began to enforce the provisions of Title IV immediately after enactment, and has denied visas and entry into the United States to Mexican and Canadian executives and their families. *See Mexican Firm Grupo Domos Found in Violation of Helms-Burton*, 13 Int'l Trade Rep. (BNA) No. 34, at 1346 (Aug. 21, 1996). Grupo Domos, a Mexican telecommunications company, and Sherritt International Corp., a Canadian mining company, were both found to be trafficking in expropriated U.S. property in Cuba. *See id.* Several of these companies' upper level executives, and their immediate families, were denied visas and entry into the United States. *See id.*; *see also 4 Executives Banned From U.S.*, WASH. POST, Mar. 15, 1997, at A11(reporting four executives of Sherritt International Corp. were banned because of their Canadian company's violations of Helms-Burton); Carla Anne Robbins & Jose de Cordoba, *Sherrit Officials to Be Barred From U.S.*, WALL ST. J., July 11, 1996, at A11 (reporting seven Canadian officials from Sherritt International Corp. were barred entry into the United States).

30. *See* §§ 201-07, 110 Stat. at 805-14. Title II allows the President to terminate the economic embargo against Cuba if Cuba changes to a democratically-elected government. *See* § 204(a), 110 Stat. at 810. Title II also permits the President to coordinate and provide economic assistance to the Cuban people to facilitate Cuba's transition into a democracy. *See* § 202, 110 Stat. at 806-808.

31. *See* § 3, 110 Stat. at 788-89; *see also* H.R. CONF. REP. NO. 104-468, at 43 (1996), *reprinted in* 1996 U.S.C.C.A.N. 527, 558 (stating the purpose of the act was to seek international sanctions against Castro's regime and to plan for a transition to democracy).

32. Senator Jesse Helms of North Carolina introduced legislation on February 9, 1995, designed to strengthen the embargo against Cuba and to allow U.S. nationals with claims

tary aircraft shot down two United States civilian aircraft on February 23, 1996.[33] President Clinton shortly thereafter signed the Helms-Burton Act into law on March 12, 1996.[34]

In its findings, Congress articulated six specific reasons for enacting Helms-Burton: (1) helping the Cuban people attain freedom and prosperity, (2) encouraging international sanctions against Castro's regime, (3) protecting United States national security against terrorism sponsored by Castro, (4) facilitating the emergence of a democratic Cuba, (5) protecting American citizens from the confiscation and "trafficking" of property that was expropriated by the Cuban government after January 1, 1959, and, (6) encouraging legitimate democratic elections.[35] Title III of the Helms-Burton Act seeks to further restrict the flow of foreign investment capital into Cuba, because foreign capital sustains Cuba's abysmal economy and, in turn, sustains Fidel Castro's regime.[36] Entitled "Protection of Property Rights of United States Nationals," Title III establishes a pri-

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of property confiscated by the Cuban government to sue any person or foreign company trafficking in the property for damages in U.S. district courts. *See* S. 381, 104th Cong. § 3 (1995). Representative Dan Burton introduced similar legislation on February 14, 1995. *See* H.R. 927, 104th Cong. (1995). The House of Representatives passed its version of the bill on September 21, 1995. *See* 141 CONG. REC. H1751 (daily ed. Feb. 14, 1995). The Senate passed its version on October 19, 1995. *See* 141 CONG. REC. S2399 (daily ed. Feb. 9, 1995). Due to discrepancies between the two versions, the bills were sent to a Conference Committee comprised of members of both the House and Senate in an effort to create a mutually acceptable piece of legislation. The Conference Committee did not issue its report until March 1, 1996. *See* H.R. CONF. REP. NO. 104-468, *reprinted in* 1996 U.S.C.C.A.N. at 558.

33. *See* § 116, 110 Stat. at 803-05 (condemning the Castro regime's act of terrorism in shooting down the planes); *see also* Jose De Cordoba, *The Question: Why Did Castro Do It?*, WALL ST. J., Feb. 27, 1996, at A19 (reporting on the damage to United States-Cuban relations caused by the destruction of the planes); Mark A.A. Warner, *Cutting Ourselves on Cuban Policy*, LEGAL TIMES, Mar. 11, 1996, at 26-27 (reporting on the Helms-Burton legislation).

34. *See President Signs Cuba Sanctions Bill After It Passes House by Big Margin*, 13 Int'l Trade Rep. (BNA) No. 11, at 421-23 (Mar. 13, 1996).

Prior to the shooting down of the two civilian planes, President Clinton vigorously opposed the private right of action granted in Title III of the Helms-Burton Act. The White House supported a Democrat filibuster against the legislation the year before. *See Clinton Says He Will Try To Reach Compromise On Helms-Burton Cuba Bill*, 13 Int'l Trade Rep. (BNA) No. 9, at 332 (Feb. 28, 1996). Secretary of State Warren Christopher recommended vetoing the Helms-Burton Act in 1995 because the foreign investment provision would have caused problems with allies and been hard to justify under international law. *See id.*

35. *See* § 3, 110 Stat. at 788-89.

36. *See* § 301(6), 110 Stat. at 814. Section 301(6) of Title III states: "This 'trafficking' in confiscated property provides badly needed financial benefit, including hard currency, oil, and productive investment and expertise, to the current Cuban Government and thus undermines the foreign policy of the United States." *Id.*; *see also* H.R. CONF. REP. NO. 104-468, at 58, *reprinted in* 1996 U.S.C.C.A.N. at 573 (stating the provision's purpose is to discourage trafficking and deny Castro funds).

vate right of action for United States citizens, in United States federal district courts, against all persons that knowingly and intentionally engage in business transactions involving American-owned property that the Castro regime confiscated and nationalized.[37] This private right of action may be brought against individuals, businesses, foreign states, and instrumentalities of foreign states.[38]

The sweeping language of the Helms-Burton Act is designed to deter foreign investment in, and foreign commerce with, Cuba.[39] While "trafficking" traditionally connotates illegal drug activity or contraband smuggling, the Helms-Burton Act's definition of "trafficking" refers to regular

37. *See* §§ 301-306, 110 Stat. at 814-22. *See also* H.R. CONF. REP. NO. at 57-66, *reprinted in* 1996 U.S.C.C.A.N. at 572-81 (discussing the provisions of Title III). For a complete history of Cuba's systematic expropriation of private property, see Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217, 219-24 (1995).

38. *See* § 302, 110 Stat. at 815-17. Under Title III, U.S. nationals may sue for money damages in the amount equal to or greater than their certified claim with the Foreign Claims Settlement Commission, plus interest, court costs and reasonable attorneys' fees. *See* § 302(a)(1), 110 Stat. at 815. There are two tiers of potential plaintiffs that may sue for damages. Title III gives preference to U.S. nationals that have a pre-existing certified claim with the Foreign Claims Settlement Commission by giving them a presumptive recovery and entitling them to treble damages. *See* § 302 (a)(2),(3), 110 Stat. at 815. The second tier of plaintiffs are U.S. nationals without certified claims who must wait for two years from the enactment of Helms-Burton before they can pursue a lawsuit under Title III. *See* § 302(a)(5), 110 Stat. at 816-17.

The Foreign Claims Settlement Commission of the United States (FCSC) was created to handle claims by U.S. citizens that had property or related interests expropriated by a foreign government. *See* 22 U.S.C. § 1623 (1994). In 1964, Congress amended the Foreign Claims Settlement Act to establish a Cuban Claims Program, under which the FCSC was given the authority to determine and certify the validity and amount of claims by U.S. nationals against the Government of Cuba for the taking of their property. *See* § 1643.

For a brief history of the response of the United States to Cuba's expropriations and possible practical remedies available for U.S. nationals, see Travieso-Diaz, *supra* note 16, at 660-64.

39. *See* § 301(11), 110 Stat. at 815; Lowenfeld, *supra* note 24, at 425; *see also supra* note 36 and accompanying text (discussing the ultimate purpose behind the deterrence of foreign investment in Cuba).

Even though the provisions of Title III have been suspended by President Clinton, Helms-Burton has still succeeded in deterring foreign investment in Cuba. *See* Paul Blustein, *Mexican Firm Quits Cuba in Face of U. S. Sanctions*, WASH. POST, May 30, 1996, at D9, 11 (reporting that a Mexican cement company stopped conducting business in Cuba because of the risk of liability under Helms-Burton); Gordon Cramb & Pascal Fletcher, *US Law on Investment in Cuba Forces ING Out of Sugar*, FIN. TIMES, July 5, 1996, at 22 (reporting that ING, a Dutch banking group that financed the Cuban sugar industry, chose not to renew its $30 million in loans to the industry in reaction to Helms-Burton); Douglas Farah, *Cubans Blame Slowdown on Helms-Burton Act*, WASH. POST, Jan. 25, 1997, at A16 ("Cuban officials now concede that the Helms-Burton Act . . . has hurt the battered Cuban economy and slowed its growth."). *But see* Pascal Fletcher, *UK-Cuba Trade Rising Despite Helms-Burton Law*, FIN. TIMES, Oct. 10, 1996 at 6 (reporting a 92% increase in British exports to Cuba from 1995 to 1996).

international commercial activities.[40] The term "traffics" is so broadly defined[41] that nearly any business transaction that in any way involves expropriated United States property in Cuba could arguably be deemed a Title III trafficking violation.[42]

The trafficking definition provides the Helms-Burton Act with a potentially unlimited extraterritorial reach.[43] The term may be interpreted to cover foreign nationals or businesses that engage in international commercial transactions that relate directly or tangentially to confiscated

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40. *See* Lowenfeld, *supra* note 24, at 425-26 (discussing the traditional and new meaning of "trafficking"); Kees Jan Kuilwijk, *Restrictions Hit Traders*, FIN. TIMES, Oct. 10, 1996, at 19 (examining the implications of Helms-Burton upon non-U.S. companies engaging in business transactions in Cuba or merely engaging in business with other companies that are involved in Cuba). *But see* Claggett, *supra* note 20, at 438 (arguing that Castro's confiscation of property was illegal under international law).

41. *See* § 4(13)(A), 110 Stat. at 790-91. "Traffics" applies to a person who knowingly and intentionally:

> (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
>
> (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
>
> (iii) causes, directs, participates in, or profits from, trafficking . . . by another person, or otherwise engages in trafficking . . . through another person without the authorization of any United States national who holds a claim to the property.

Id.

42. *See infra* notes 157-69 and accompanying text (explaining the broad range of potential trafficking violations under Title III).

There are limited exclusions from the trafficking definition:

> (i) the delivery of international telecommunication signals to Cuba;
>
> (ii) the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated national;
>
> (iii) transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel; or
>
> (iv) transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban Government or the ruling political party in Cuba.

§ 4(13)(B), 110 Stat. at 790-91.

43. *See infra* notes 158-69 and accompanying text (providing examples of Title III trafficking violations). For a general discussion on interpretations of "trafficking," see Fairley, *supra* note 20, at 8-9 (examining the interpretation, or lack thereof, of "trafficking" in the context of the implementation and enforcement of Title III); *see also* Department of State, Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act, 61 Fed. Reg. 30,655 (1996) (providing the State Department's interpretation of trafficking within the context of the enforcement of Title IV).

property.[44] In addition, any foreign corporate parent, subsidiary, or affiliate that profits from such trafficking may also be found liable under Title III.[45] Trafficking violations may also extend liability to foreign entities financing the Cuban sugar industry, as well as United States entities that receive proceeds from trafficking activities, such as banks, commodity traders, or other financial institutions.[46] For example, if a United States bank receives a loan payment derived from profits gained by a foreign company engaged in trafficking activities, the United States bank also may be subject to a suit under Title III.[47] Such broad interpretations of

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44. *See* Department of State, Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act, 61 Fed. Reg. 30,655; Department of Justice, Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. 24,955.

The European Union (EU) has vigorously protested the extraterritorial reach of Helms-Burton to include indirect imports as trafficking violations under Title III. *See EU Formally Requests WTO Talks Over Cuba Sanctions Legislation*, 13 Int'l Trade Rep. (BNA) No. 19, at 762 (May 8, 1996) [hereinafter *EU Requests WTO Talks*] (discussing the EU's concern towards Helms-Burton's extraterritorial reach to indirect sugar imports, as well as direct exports of products that include sugar imported to the EU from Cuba).

45. *See* § 4(13)(A), 110 Stat. at 791. *See generally* Note, *Extraterritorial Subsidiary Jurisdiction*, 50 LAW & CONTEMP. PROBS. 71, 71-77 (1987) (examining U.S. courts' assertion of personal jurisdiction over foreign subsidiaries through parent companies) [hereinafter *Extraterritorial Subsidiary*]. Attorneys representing potential U.S. plaintiffs under Title III have already targeted U.S. subsidiaries as possible defendants. For example, former American owners of a Cuban tobacco plantation have targeted a U.S. subsidiary of British-American Tobacco (BAT), which manufactures Lucky Strike cigarettes in Kentucky. *See* Desloge, *supra* note 17, at C4. BAT has a joint venture with a Brazilian company in Cuba to grow tobacco on land expropriated from U.S. nationals. *See id.*

46. *See* Pascal Fletcher, *Cuban Sugar's Foreign Sweetner: European Finance Lifts an Industry Starved of Capital for Four Years*, FIN. TIMES, July 24, 1996, at 22 (reporting on Helms-Burton's effect on foreign financing of the Cuban sugar industry).

47. *See* Matias F. Travieso-Diaz, *Why Lawyers Love the Cuba Bill*, J. COMM., Mar. 18, 1996, at 6A.

In the cases where certified claims involve several million dollars, U.S. nationals and corporations bringing law suits under Title III most likely will spark complex, multi-party litigation. *See* Desloge, *supra* note 17, at C4. The following are a few of the major U.S. companies with certified claims against Cuba: Coca-Cola ($27.5 million), General Dynamics ($10.4 million), ITT ($47.6 million), Standard Oil ($71.6 million), and Texaco ($50.1 million). *See Seeking Settlements From Cuba*, USA TODAY, July 15, 1996, at 3B. Under Title III, certified claimants are entitled to treble damages. *See* § 302 (a)(3)(C)(ii), 110 Stat. at 816. In an effort to maximize their recovery efforts, these claimants probably will sue as many potential traffickers directly and indirectly related to their confiscated Cuban property as possible. *See* Noreen Marcus, *Helms-Burton Sparks Suits: Attorneys Capitalize on Anti-Castro Law*, LEGAL TIMES, Apr. 8, 1996, at 2 (reporting on plaintiffs preparing to sue under Helms-Burton); *see also* Desloge, *supra* note 17 at C4 (reporting on several potential Helms-Burton lawsuits).

Advocates of the Helms-Burton Act attempt to justify the potential legal complications by emphasizing that the Act's ultimate goal is deterrence, not the promotion of complex litigation. However, if Congress is willing to "talk the talk" and threaten foreign businesses with private causes of action, Congress must also be prepared to "walk the walk"

Title III implicate due process issues related to the exercise of personal jurisdiction by United States courts over foreign, as well as American, defendants sued under its provisions.[48] Undoubtedly, due process and jurisdictional issues will be a focal point for many defendants sued under Title III.[49]

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and accept the practical domestic legal repercussions if Title III, or similar overly broad extraterritorial legislation, is enforced.

48. *See infra* notes 104-30 and accompanying text (discussing the due process requirements and protections afforded foreign defendants haled into U.S. courts under extraterritorial U.S. law).

49. *See infra* notes 158-69 and accompanying text (discussing potential Helms-Burton lawsuits).

The Foreign Sovereign Immunities Act (FSIA) is a federal long-arm statute authorizing U.S. courts to exercise subject matter and personal jurisdiction over suits arising under U.S. relations with other countries. 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11 (1994). The commercial activities exception of the FSIA and Title III of Helms-Burton may potentially have many parallels in regard to litigation arising from their respective implementation. The FSIA was a very controversial extraterritorial application of U.S. law, heavily contested by the international community and litigated in U.S. courts. *See* Victoria A. Carter, Note, *God Save the King: Unconstitutional Assertions of Personal Jurisdiction over Foreign States in U. S. Courts*, 82 VA. L. REV. 357, 359-66 (1996) (examining the exercise of personal jurisdiction and possible constitutional law violations under the FSIA). The FSIA codifies the "restrictive theory" of sovereign immunity. *See* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 310 (2d Cir. 1981); *see also* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, app.2 at 711 (1976) (noting that the United States adopted the restrictive theory of sovereign immunity under which commercial or proprietary actions of foreign governments are not protected); Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari, 810 F. Supp. 1375, 1378-79 (S.D.N.Y. 1993) (discussing the adoption and application of the restrictive theory of sovereign immunity).

Under the FSIA, a foreign state or its instrumentalities, such as a bank or government-owned corporation, are immune from the exercise of personal jurisdiction in U.S. courts, unless one of the specific exceptions in the FSIA is applicable or the foreign sovereign consents to jurisdiction. *See* 28 U.S.C. § 1605(a) (1)-(6). Title III of Helms-Burton applies to foreign corporations trafficking confiscated U.S. property. *See* § 302(a)(1), 110 Stat. at 815. In an important similarity to the FSIA, most business ventures in Cuba will probably entail a joint venture between a foreign corporation and the Cuban government. *See* Ron First, Comment, *Cuba's Changing Foreign Investment Climate: Castro's Attempt to Lure Foreign Investors*, 9 TRANSNAT'L L. 295, 300-30 (1996) (explaining Cuba's new foreign investment law). Furthermore, Helms-Burton explicitly denies the use of the Act of State doctrine as a defense for foreign sovereign defendants. *See* § 302(a)(6), 110 Stat. at 817. The Act of State doctrine is defined as "the courts of one country will not sit in judgment of the acts of the government of another done within its own territory." *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

Under the "commercial activities" exception of the FSIA, sovereign immunity does not apply when the foreign entity engages in "(1) commercial activity in the U.S.; (2) an act performed in the U.S. in connection with commercial activity occurring elsewhere; or (3) an act outside the territory of the U.S. in connection with commercial activity elsewhere that causes a direct effect in the U.S." 28 U.S.C. § 1605(a)(2); *see also* Richard Wydeven, Note, *The Foreign Sovereign Immunities Act of 1976: A Contemporary Look at Jurisdiction Under the Commercial Activity Exception*, 13 REV. LITIG. 143, 146-68 (1993) (examining

II. The Legal Principles Addressing the Limitations on the Exercise of Extraterritorial Jurisdiction

For a valid exercise of extraterritorial jurisdiction,[50] a United States court must have both subject matter jurisdiction over the controversy[51]

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the three clauses of the commercial activity exception and the determination of the valid exercise of personal jurisdiction upon foreign defendants whose conduct has a direct effect upon the U.S.). In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), the Supreme Court defined "commercial activity" as either a regular course of commercial conduct or a particular commercial transaction or act. *See id.* at 612-14.

Because the commercial activities exception to the FSIA does not mention minimum contacts requirements, foreign defendants sought dismissal of lawsuits on the grounds of lack of jurisdiction of the U.S. courts to hear the claim. *See also* 28 U.S.C. § 1605(a)(2); Carter, *supra*, at 364-65 (discussing the due process implications of FSIA's jurisdictional grant). The Helms-Burton legislation purposefully avoids any mention of jurisdictional principles; relying upon existing jurisdictional jurisprudence for lawsuits brought under Title III. *See Cuba Liberty and Democratic Solidarity Act: Hearings Before the Senate Subcomm. on Western Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 104th Cong. 104-212 (1995) (statement of Monroe Leigh, Steptoe & Johnson) ("[Helms-Burton] does not create any new standard for the exercise of personal jurisdiction over individuals or corporations. Instead, the Act is silent on this subject, relying on the standards established by the Supreme Court in cases such as *International Shoe* and *Worldwide Volkswagen.*").

The Supreme Court recognized that lawsuits brought under the "direct effect" clause of the FSIA commercial activity exception may not always satisfy due process requirements for personal jurisdiction. *See Weltover*, 504 U.S. at 619 (addressing the Fifth Amendment requirements); *see also Texas Trading*, 647 F.2d at 313-15 (addressing the Constitutional constraints on jurisdiction under the FSIA); Walpex Trading Co. v. Yacimintos Petroliferos Fiscales Bolivanos, 712 F. Supp. 383, 390 (S.D.N.Y. 1989) ("Congress did not have the authority to override the constitutional due process constraints underlying personal jurisdiction when it drafted the FSIA."). It follows that lawsuits brought under Title III of Helms-Burton may also be open for challenge on jurisdictional due process grounds.

50. Black's Law Dictionary 588 (6th ed. 1990) (defining extraterritorial jurisdiction as "[j]uridical power which extends beyond the physical limits of a particular state or country" and defining extraterritoriality as "[t]he extraterritorial operation of laws; that is, their operations upon persons . . . existing beyond the limits of the enacting state or nation, but still amenable to its laws").

51. *See* Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) ("The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties."); Black's Law Dictionary 1425 (6th ed. 1990) (defining subject matter jurisdiction as the court's "power to deal with the general subject involved in the action"); *see also* Joelson, *supra* note 5, at 143-51 (1994) (examining federal subject matter jurisdiction in U.S. courts).

It is well established that legislation may be applied to foreign conduct abroad. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."); United States v. Medjuck, 48 F.3d 1107, 1110-11 (9th Cir. 1995) ("There is generally no constitutional bar to such extraterritorial application of domestic penal laws. We require only that Congressional intent of extraterritorial scope be clear and the application of the statue to the acts in question not violate the due process clause of the Fifth Amendment."); *see also* Born, *supra* note 9, at 2-7 (reviewing the evolution of extraterritorial U.S. law in state and federal

and personal jurisdiction over the defendant.[52] The requirement of personal jurisdiction[53] stems from the Due Process Clause of the Fifth Amendment[54] and applies to foreign defendants haled into a United States court under extraterritorial federal legislation.[55] The legal stan-

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courts and suggesting that the territorial presumption that attaches to legislation should be abandoned entirely).

The Federal Rules of Civil Procedure prescribe the requirements for effecting service of a summons to establish personal jurisdiction over any foreign or nonresident defendant. *See* FED. R. CIV. P. 4(k). In determining whether service is effective to exercise personal jurisdiction, the federal court examines the defendants' contacts with the United States as a whole, instead of their contacts within the particular territorial boundaries of the court's forum. *See id.* Section 2 of Rule 4 states:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Id.; *see also Texas Trading*, 647 F.2d at 308 (explaining that statutory personal jurisdiction, such as service of process under Rule 4(k) referenced in the FSIA, still requires due process scrutiny); Kent Sinclair, *Service of Process: Amended Rule 4 and the Presumption of Jurisdiction*, 14 REV. LITIG. 159, 188-91 (1994) (explaining the provisions and application of Rule 4(k)); Holly A. Ellencrig, Comment, *Expanding Personal Jurisdiction Over Foreign Defendants: A Response to* Omni Capital International v. Rudolf Wolff & Co., 24 CAL. W. INT'L L.J. 363, 370-75 (1994) (examining Federal Rule 4(k) and the due process issues that arise from its application).

52. The requirement for personal jurisdiction is derived from the Due Process Clause of the Fifth and Fourteenth Amendments. *See Insurance Corp. of Ireland*, 456 U.S. at 702; Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 143 (1st Cir. 1995) ("Personal jurisdiction implicates the power of a court over a defendant.").

53. *See* Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 7-10 (1993) (examining the origins of the due process doctrine in relation to extraterritorial assertions of jurisdiction); Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 534-40, 545-58 (1995) (explaining personal jurisdiction jurisprudence as developed by the Supreme Court and suggesting alternative approaches to eliminate the current reigning chaos of jurisdictional legal principles and standards).

54. *See* U.S. CONST. amend. V. ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); *see also* Gary A. Haugen, *Personal Jurisdiction and Due Process Rights for Alien Defendants*, 11 B.U. INT'L L.J. 109, 111-14 (1993) (examining the Supreme Court's position that the due process clauses of the Fifth and Fourteenth Amendments protect foreign defendants from unreasonable assertions of jurisdiction by U.S. courts).

55. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that due process requires that a nonresident defendant must have minimum contacts with the forum so that assertion of jurisdiction does not offend "traditional notions of fair play and substantial justice" (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940))); *Texas Trading*, 647 F.2d at 307 (noting that congressional legislation attempting to link personal jurisdiction to subject matter jurisdiction is limited by the Due Process Clause); *see also* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 5-10 (1987) (examining U.S. state and federal courts' responses to jurisdictional challenges by foreign defendants who argue for due process protection from the court's assertion of personal jurisdiction); Brilmayer, *supra* note 8, at 14-16, 24-35 (examining the historical

dard for the valid exercise of extraterritorial personal jurisdiction requires that the foreign defendant have minimum contacts with the United States forum so that maintaining the action "does not offend traditional notions of fair play and substantial justice."[56]

A. The Test for Assertion of Extraterritorial Subject Matter Jurisdiction

To determine whether a United States court has jurisdiction over foreign, nonresident extraterritorial conduct, two inquiries are potentially relevant.[57] First, a court must consider whether Congress intended the

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and analytic development of due process issues raised by the assertion of extraterritorial jurisdiction); Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on* International Shoe *and Its Progeny*, 28 U.C. DAVIS L. REV. 965, 966-70 (1995) (tracing the historical evolution of due process requirements in personal jurisdiction jurisprudence, and advocating the abandonment of federal subject jurisdiction and the adoption of congressional legislation that allocates personal jurisdiction on the state level based on other international law models); Sean K. Hornbeck, Comment, *Transnational Litigation and Personal Jurisdiction Over Foreign Defendants*, 59 ALB. L. REV. 1389, 1426-43 (1996) (examining jurisdictional problems in transnational litigation within the United States).

56. *International Shoe*, 326 U.S. at 316; *see also* Linda J. Silberman, *"Two Cheers" for* International Shoe *(and None for* Asahi*): An Essay on the Fiftieth Anniversary of* International Shoe, 28 U.C. DAVIS L. REV. 755, 756-67 (1995) (comparing the constitutional analytic framework in *International Shoe* with the succeeding framework established by the Supreme Court, and concluding that *International Shoe* was more practical in its application than the succeeding legal standards).

For examples of extraterritorial application of U.S. subject matter jurisdiction to reach U.S. citizens abroad, see *Blackmer v. United States*, 284 U.S. 421, 438-40 (1932) (upholding the application of the Walsh Act's requirement that U.S. citizens abroad return to the U.S. if required by court proceedings or other circumstances), and *Cook v. Tait*, 265 U.S. 47, 53 n.1, 54-56 (1924) (applying federal income tax regulations to U.S. citizens living abroad).

57. *See* United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945) (reviewing congressional intent and constitutional limitations regarding foreign nationals).

In the beginning of the twentieth century of the United States, the Supreme Court applied the "territorial principle," an international law concept, to its jurisdictional analysis. *See* American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (declining to extend the Sherman Act outside the boundaries of U.S. territory). The territorial principle mandated that U.S. law only apply within its borders. *See id.* at 355-57; Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-85 (1949) ("[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. . . ."). The territorial principle is still recognized today. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality.").

Early in American history, however, the Supreme Court still recognized that the Constitution conferred upon Congress the power to enact extraterritorial legislation. *Cf.* United States v. Palmer, 16 U.S. (3 Wheat) 610, 630 (1818) ("The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.").

law to have an extraterritorial application.[58] Second, a court may inquire whether the Constitution, and in particular the Due Process Clause, permits such an extension of United States law.[59]

1. The Intended Effects Test

With regard to the first inquiry, where congressional intent is not clear, the courts have created a two-pronged test to determine whether a United States court has subject matter jurisdiction over extraterritorial conduct.[60] Under this test, courts (1) examine whether there is a detri-

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58. *See Alcoa*, 148 F.2d at 443 ("[W]e are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it.").

As American international commercial activities expanded, it became apparent that some activities occurring abroad could have a substantial effect within the borders of the United States. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957) (recognizing that advances in technology required changes in the law to adapt to a more closely integrated nation and world); Ford v. United States, 273 U.S. 593, 620-23 (1927) (discussing international recognition of extraterritorial jurisdiction); United States v. Bowman, 260 U.S. 94, 98-99 (1922) (recognizing that the government may enact extraterritorial criminal statutes "to defend itself against obstruction, or fraud *wherever* perpetrated") (emphasis added). Thereafter, Congress began enacting legislation that created subject matter jurisdiction in U.S. courts for certain activities of foreign entities occurring abroad. *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 705 (1962) (finding that liability could still be found notwithstanding *American Banana* in a private action under U.S. antitrust laws, "[s]ince the activities of the defendants had an impact within the United States and upon its foreign trade"); United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927) (concluding that extraterritorial application of the Sherman Antitrust Act and Wilson Tariff Act was acceptable because of the negative impact of the foreign defendants' intentional conduct, which occurred outside the territorial boundaries of the United States, because the conduct had "forbidden results within the United States"). In addition, U.S. courts began recognizing that some legislation applied to extraterritorial foreign conduct even if the statute did not expressly state an intent for an extraterritorial application. *See, e.g.*, Steele v. Bulva Watch Co., 344 U.S. 280, 286-87 (1952) (holding that the Lanham Act, which governs patents and trademarks, applied extraterritorially); *Ford*, 273 U.S. at 620-21 (recognizing that foreign acts committed outside the United States that are intended to have a detrimental effect within its borders should be brought within the jurisdiction of the United States); United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987) ("Where an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction to arrest and try the offenders."); Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 641-43 (2d Cir. 1956) (examining the extraterritorial reach of patent and trademark laws). *See generally* Born, *supra* note 9, at 39-55 (surveying the interpretation of the Sherman Act and the application of the effects doctrine to determine extraterritorial jurisdiction for federal trademark and patent laws, maritime legislation, securities laws, maritime legislation, and criminal legislation).

59. *See Alcoa*, 148 F.2d at 443 ("[T]he only question open is whether Congress had the intent to impose liability, and whether our own Constitution permitted it to do so. . . .").

60. *See id.* at 443-44 (explaining the analytic framework, latter called the "effects test," for determining extraterritorial subject matter jurisdiction when congressional intent is not clear); *see also* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 608-12 (9th Cir.

mental effect within the United States, that (2) results directly from foreign activities that are intended to have a negative impact within the United States.[61]

The test to extend United States law to foreign conduct occurring outside the territory of the United States was created in *United States v. Aluminum Co. of America (Alcoa)*.[62] Signalling the beginning of modern extraterritorial federal legislation,[63] *Alcoa* addressed whether the Sher-

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1976) (discussing the *Alcoa* effects analysis). Courts created a "conduct test" to be used in conjunction with the effects test in regard to international securities transactions. *See* Tamari v. Bache & Co. (Lebanon) S.A.L., 730 F.2d 1103, 1107-08 (7th Cir. 1984) (applying the "conducts" and "effects" tests to the Commodity Exchange Act to determine if Congress intended for its extraterritorial application).

The effects test borrowed from international law the "Effects Doctrine," which recognizes that any nation may impose liabilities for conduct outside its borders that has consequences within the borders of that nation, and that a nation may impose liabilities upon a person with no allegiance to that nation. 1 RESTATEMENT (THIRD) FOREIGN RELATIONS LAW §§ 402-03, at 237-254 (1986) (recognizing the international effects doctrine as a valid justification for conferring jurisdiction abroad).

The effects doctrine is referenced in Title III of Helms-Burton under the statement of findings in section 301: "International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory." Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 301(9), 110 Stat. 785, 815 (1996).

Many of the current legal principles and standards used to determine the extraterritorial reach of U.S. laws were developed in antitrust cases dealing with extraterritoriality. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."); Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American Commerce." (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962))); *see also* Born, *supra* note 9, at 39-55 (surveying the interpretation of the extraterritorial application of various federal statutes).

61. *See Alcoa*, 148 F.2d at 443-44 (providing the framework for determining whether to apply U.S. antitrust laws extraterritorially); *see also Hartford Fire*, 509 U.S. at 796 (finding the allegations in the case state the conduct was intended to affect the U.S. insurance market).

62. 148 F.2d 416 (2d Cir. 1945). In *Alcoa*, the Second Circuit sat as the court of last resort because the Supreme Court could not muster a quorum thus its opinion was final. *See* Gibney, *supra* note 8, at 298 n.4; *see also* James J. Friedberg, *The Convergence of Law in an Era of Political Integration: The* Wood Pulp *Case and the* Alcoa *Effects Doctrine*, 52 U. PITT. L. REV. 289, 324-27 (1991) (examining the complications created by a global economy and the U.S. courts' application of the effects doctrine to foreign violations of U.S. trade laws); Edward L. Rholl, *Inconsistent Application of the Extraterritorial Provisions of the Sherman Act: A Judicial Response Based upon the Much Maligned "Effects" Test*, 73 MARQ. L. REV. 435, 441-51 (1990) (tracing the development of extraterritorial subject matter jurisdiction under the Sherman Act after the *Alcoa* decision).

63. *See* Born, *supra* note 9, at 32-37 (discussing decisions based on *Alcoa*).

man Act[64] and other United States antitrust laws[65] applied to conduct abroad even though the antitrust laws' provisions did not expressly provide for extraterritorial application.[66] To determine the validity of the extraterritorial application of United States antitrust laws, the Second Circuit considered whether (1) Congress intended to impose liability; and (2) the Constitution would permit such action.[67]

In *Alcoa*, the court focused on whether Congress intended an extraterritorial extension of the Sherman Act, and did not address the constitutional limitations of such an extension.[68] Under the *Alcoa* effects test, liability under United States antitrust laws could be found whenever (1) intentional foreign conduct affects United States commerce;[69] and, (2) such conduct results in a demonstrated actual or presumed anti-competitive effect on United States markets.[70] Following the *Alcoa* decision, the

64. 15 U.S.C. §§ 1-7 (1994).

65. *See* Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1994); Clayton Antitrust Act, 15 U.S.C. § 12 (1994); Federal Trade Commission Act, 15 U.S.C. § 45 (1994).

66. *Alcoa*, 148 F.2d at 443.

67. *See id.*

68. *See id.* at 443-44. It is recognized that, historically, constitutional arguments have rarely been advanced by foreign defendants objecting to the extraterritorial application of U.S. law. *See* Brilmayer, *supra* note 8, at 25 ("[C]onstitutional arguments rarely have been advanced in the briefs of parties resisting application of American law."). However, given the trend of increasingly bold extraterritorial legislation promulgated by Congress and proposed by the executive branch, these arguments have become more important to foreign defendants haled into a U.S. forum. Due process defenses have been utilized most often in litigation arising from the commercial activities exception of the FSIA. *See* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981) ("[T]he [FSIA] cannot create personal jurisdiction where the Constitution forbids it. Accordingly, each finding of personal jurisdiction under the FSIA requires . . . a due process scrutiny of the court's power to exercise its authority over a particular defendant."); Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari, 810 F. Supp. 1375, 1388-90 (S.D.N.Y. 1993) (examining the due process protections afforded foreign defendants haled into U.S. court under the commercial activities exception to the FSIA); Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivanos, 712 F. Supp. 383, 390-92 (S.D.N.Y. 1984) (discussing the application of constitutional due process limits to the extraterritorial application of the FSIA); Exchange Nat'l Bank of Chicago v. Empresa Mineral Del Centro Del Peru S.A., 595 F. Supp. 502, 505 (S.D.N.Y. 1984) (rejecting the assertion of extraterritorial jurisdiction over the foreign defendants based on due process grounds).

69. *See Alcoa*, 148 F.2d at 443. For an analysis of cases where courts attempt to define and analyze the term "effect" within the context of a "direct effect" analysis, see Hadwin A. Card, III, Note, *Interpreting the Direct Effects Clause of the FSIA's Commercial Activity Exception*, 59 FORDHAM L. REV. 91, 99-108 (1990) (examining a variety of interpretations of the direct effects clause of the commercial activities exception to the FSIA).

70. *See Alcoa*, 148 F.2d at 443.

Supreme Court endorsed the Second Circuit's effects test in *American Tobacco Co. v. United States*.[71]

2. *International Comity: The Addition of a Third Prong*

Subsequent to the *Alcoa* and *American Tobacco* decisions, several courts added a third prong to the effects test.[72] In addition to considering whether foreign conduct affects United States imports, exports, or interstate commerce, and whether a demonstrated injury exists,[73] courts also began to balance foreign and United States interests.[74]

As explained by the United States Court of Appeals for the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*,[75] an antitrust case, the *Alcoa* effects analysis was incomplete because it did not consider or balance foreign interests against the United States interest in exercising jurisdiction and adjudicating the suit.[76] In adding a third prong, the court acknowledged that foreign policy and international comity considera-

71. 328 U.S. 781, 811-14 (1946) (reviewing and adopting *Alcoa*); *see* Rholl, *supra* note 62, at 441-51 (1990) (surveying the application of the effects test to determine subject matter jurisdiction under the Sherman Act after the *Alcoa* decision).

Courts and federal regulatory agencies have applied the effects test to assess the extraterritorial reach of antitrust laws on a variety of international industries. *See* Born, *supra* note 9, at 32 (noting the broad extraterritorial application of antitrust laws under the effects doctrine). The effects doctrine was also used to determine the validity of the extraterritorial application of other federal laws, including federal securities regulation, patent and trademark laws, and various criminal laws such as the Racketeer Influenced and Corrupt Organizations Act (RICO). *See, e.g.*, Alfadda v. Fenn, 935 F.2d 475, 478-80 (2d Cir. 1991) (applying the conduct test to determine if the district court had proper subject matter jurisdiction over RICO and securities fraud violations against a foreign corporation whose predicate acts occurred within the United States but whose activities which were an actual violation of U.S. law occurred overseas); United States v. Yousef, 927 F. Supp. 673, 678-80 (S.D.N.Y. 1996) (examining the exercise of extraterritorial jurisdiction under the Aircraft Sabotage Act, which does not expressly provide for such jurisdiction); Philip R. Wolf, *International Securities Fraud: Extraterritorial Subject Matter Jurisdiction*, 8 N.Y. INT'L L. REV. 1, 4-14 (1995) (examining the courts' application of the effects test and the conduct test to determine whether the extraterritorial application of U.S. securities laws is appropriate).

72. *See infra* notes 75-81 (discussing the addition of the third "international comity" prong to the intentional effects and traditional conduct analyses).

73. *See* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 612-13 (9th Cir. 1976) (finding a three part analysis appropriate).

74. *See* Born, *supra* note 9, at 33-35 (noting that in response to the hostile reactions of the international community to the application of the effects doctrine, "[l]ower U.S. courts and other authorities turned, then, directly to emerging principles of public international law and comity to define the extraterritorial reach of the antitrust laws."); *see also infra* note 81 and accompanying text (discussing cases addressing the international comity issues).

75. 549 F.2d 597 (9th Cir. 1976).

76. *See id.* at 613-15. In *Timberlane*, the plaintiffs alleged that the defendants conspired to effect Timberlane Lumber Company's efforts to obtain lumber from Honduras. *See id.* at 604. The plaintiffs alleged that this conspiracy resulted in over $5 million in

tions[77] must be examined when determining whether a court should assert extraterritorial jurisdiction over a foreign corporation's activities.[78]

Adopting a "jurisdictional rule of reason," the court stated that limiting jurisdiction would be appropriate when United States interests fail to outweigh the incentive for maintaining harmonious foreign relations.[79] In essence, the court determined that, theoretically, United States interests could be overridden by the disruptive effects a decision might have in the international arena. Thus, the *Timberlane* court added international comity as the third prong of its analysis.[80] Other circuits, including the Third, Fifth, and Tenth, added this third prong to the traditional effects test.[81]

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damages and that such a loss had a direct and substantial effect on U.S. foreign commerce. *See id.* at 605.

77. *See id.* at 613; *see also* Hilton v. Guyot, 159 U.S. 113, 164 (1895) (defining "Comity of Nations" as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws"); *In re* Maxwell Communication Corp., 93 F.3d 1036, 1046-48 (2d Cir. 1996) (examining the international comity doctrine).

78. *See Timberlane*, 549 F.2d at 613; *see also* A. Paul Victor & John G. Chou, *United States Antitrust Jurisdiction Over Overseas Disputes After Title IV of the 1982 Export Trading Company Act and* Timberlane, 10 FORDHAM INT'L L.J. 1, 6-12 (1986) (examining the *Timberlane* decision and surveying various applications of the *Timberlane* three part analysis).

79. *See Timberlane*, 549 F.2d at 614-15. The court recognized the significance of weighing the "regard for comity and the prerogatives of other nations" in determining the limitations upon the extraterritorial reach of U.S. antitrust laws. *Id.* at 612; *see also* Michael G. McKinnon, Comment, *Federal Judicial and Legislative Jurisdiction Over Entities Abroad: The Long-Arm of U.S. Antitrust Law and Viable Solutions Beyond The* Timberlane/Restatement *Comity Approach*, 21 PEPP. L. REV. 1219, 1251-96 (1994) (examining the history and development of extraterritorial analysis and discussing the application and limitations upon comity factors in such analyses).

80. *See Timberlane*, 549 F.2d at 613-15.

81. *See, e.g.*, Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884-85 (5th Cir. 1982) (stating that international comity should be considered in determining whether to apply U.S. antitrust laws extraterritorially); Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869-71 (10th Cir. 1981) (stating factors used in balancing U.S. and foreign interests, and stating that "[c]omity concerns outweigh *any affect* on United States commerce) (emphasis added); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979) (adopting the *Timberlane* approach and stating factors to be used for the third prong of the analysis).

In *Mannington Mills*, the Third Circuit articulated several factors which should be considered when addressing international comity concerns:

(1) Degree of conflict with foreign law or policy;

(2) Nationality of the parties;

(3) Relative importance of the alleged violation of conduct [in the United States] compared to that abroad;

(4) Availability of a remedy abroad and the pendency of litigation there;

3. *The True Conflict Test: International Comity Considerations Narrowed*

The Supreme Court recently rejected the third prong of the *Timberlane* analytical framework. As a substitute for international comity considerations, in determining the validity of extraterritorial subject matter jurisdiction,[82] the Court created a new "true conflict" test in *Hartford Fire Insurance Co. v. California*.[83] In *Hartford Fire*, the Court held that, absent a true conflict between United States law and the law or policy of another nation, the assertion of extraterritorial subject matter jurisdiction by a United States court is valid.[84]

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(5) Existence of intent to harm or affect American commerce and its foreseeability;
(6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
(7) If relief is granted, whether a party will be placed in a position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
(8) Whether the court can make its order effective;
(9) Whether an order for relief would be acceptable in [the United States] if made by the foreign national under similar circumstances; [and]
(10) Whether a treaty with the affected nations has addressed the issue.

595 F.2d at 1297-98; *see also* Born, *supra* note 9, at 37-39 (noting the *Timberlane* decision formed part of the basis for the *American Law Institute's Restatement (Third) Foreign Relations Law* sections 402 and 403 addressing legislative jurisdiction); Victor & Chou, *supra* note 78, at 6-13 (surveying various lower federal court decisions applying the *Timberlane* three part analysis). *But see* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 948-49 (D.C. Cir. 1984) (rejecting the balancing of international comity analysis in determining jurisdiction).

82. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796-97 (1993); *see also* John A. Trenor, Comment, *Jurisdiction and the Extraterritorial Application of Antitrust Laws After* Hartford Fire, 62 U. CHI. L. REV. 1583, 1589-617 (1995) (examining the change in extraterritorial jurisdictional analysis and supporting the return to legislative jurisdiction analysis, i.e., requiring a showing of clear congressional intent). *But cf.* Varun Gupta, Note, *After* Hartford Fire*: Antitrust and Comity*, 84 GEO. L.J. 2287, 2315-18 (1996) (defending the *Hartford* decision and advocating the complete abandonment of international comity considerations in extraterritorial antitrust enforcement).

83. 509 U.S. 764 (1993). In *Hartford Fire*, 19 states and various private parties brought antitrust suits against domestic insurers, domestic and foreign reinsurers, and insurance brokers, alleging that London reinsurers were engaged in a conspiracy to affect the U.S. insurance market and that their conduct produced a substantial effect in the United States. *See id.* at 770-71, 794-95. The London reinsurers argued that the exercise of jurisdiction by a U.S. court was improper under the principle of international comity. *See id.* at 798-99. The District Court found that international comity considerations were an important factor which led to its determination that the exercise of extraterritorial jurisdiction over British defendants would be inappropriate. *See id.* at 778. The Ninth Circuit reversed on the extraterritorial jurisdiction issue and remanded on other grounds. *See id.* at 778-79.

84. *See id.* at 798-99; *see also* Robert C. Reuland, Hartford Fire Insurance Co., *Comity, and the Extraterritorial Reach of United States Antitrust Laws*, 29 TEX. INT'L L.J. 159, 172-73 (1994) (explaining the *Hartford Fire* holding); Gupta, *supra* note 82, at 2299-305 (exam-

Revisiting the standard two-prong *Alcoa* effects test, the Court reasoned that the extraterritorial application of United States law is appropriate if such conduct has a demonstrated effect within the United States and the foreign entity intended to affect United States commerce, imports, or exports through its conduct.[85] The Court stated that the jurisdictional nexus is the effect of the intentional foreign conduct upon the United States.[86] Therefore, after *Hartford Fire*, international comity is no longer a consideration in determining the validity of exercising extraterritorial subject matter jurisdiction; Justice Souter, however, writing for the majority, hinted that international comity considerations may still be addressed within a court's personal jurisdiction analysis.[87]

By removing international comity from the threshold extraterritorial subject matter jurisdiction analysis, the Court narrowed the definition of a true conflict between United States and foreign law.[88] The Court did not elaborate or provide additional guidelines for its true conflict standard for determining when such a conflict exists.[89] As a result, the true conflict standard may be open to two interpretations. Under the first, a true conflict may exist only if the foreign sovereign mandates a particular activity.[90] Under the second interpretation, a true conflict may exist

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ining the "true conflict" standard and both the majority and minority opinions' use of the *Restatement (Third) of Foreign Relations Law of the United States*)).

85. *Hartford Fire*, 509 U.S. at 779. *See generally* Dam, *supra* note 1 (examining the *Hartford* decision in the context of an international policy decision and how domestic economic polices are increasingly conflicting with international relations due to the accelerated integration of the global economy).

86. *Hartford Fire*, 509 U.S. at 796.

87. *See id.* at 795-99; *id.* at 797 n.24 (noting that after the determination of valid subject matter jurisdiction, international comity considerations may still be addressed within a court's personal jurisdiction analysis.

88. *See id.* at 797-99; *see also* Dam, *supra* note 1, at 302; Mary Catherine Pelini, Case Comment, *The Extraterritorial Jurisdiction Analysis in Light of* Hartford Fire Insurance Co. v. California: *How Peripheral Has the International Comity Notion Become?*, 55 OHIO ST. L.J. 477, 478, 481-89 (1994) (explaining the differences between the majority and dissenting opinions' treatment of the true conflict standard and the utilization of international comity considerations within extraterritorial jurisdictional analysis).

Dissenting in *Hartford Fire*, Justice Scalia stated that it is a firmly established principle in U.S. jurisprudence that U.S. courts use international legal principles to limit the extraterritorial reach of U.S. statutes. *Hartford Fire*, 509 U.S. at 813-22 (Scalia, J., dissenting). Justice Scalia expressed concern that the majority opinion would create unnecessary conflicts with other countries, "particularly our closest trading partners." *Id.* at 820.

89. *See Hartford Fire*, 509 U.S. at 798-99; *see also In re* Maxwell Communication Corp., 93 F.3d 1036, 1047-49 (2d Cir. 1996) (explaining two possible applications of international comity in light of *Hartford Fire*); Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 846 n.5 (9th Cir.), *cert. denied*, 117 S. Ct. 181 (1996) (discussing the direct conflict standard and the use of comity factors in an extraterritorial jurisdiction analysis).

90. *See* Andreas F. Lowenfeld, Editorial Comment, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89

when a foreign defendant cannot simultaneously comply with the laws of his own country and those of the United States.[91] While confusion remains concerning the exact interpretation of a true conflict,[92] the majority opinion in *Hartford Fire* implied that true conflicts would have potentially serious repercussions upon international relations and United States foreign policy.[93]

4. *Foreign Blocking Statutes: Foreign Governments' Response to United States Assertions of Extraterritorial Subject Matter Jurisdiction*

In response to United States extraterritorial legislation, many countries have enacted blocking statutes intended to bar the extraterritorial reach of United States law upon their governments, citizens, and corporations.[94] Blocking statutes protect the enacting country's commercial interests by preventing the recognition or enforcement of United States judgments, orders, and legislation.[95] Blocking statutes prohibit the enact-

AM. J. INT'L L. 42, 48, 50 (1995) (explaining the foreign sovereign compulsion defense and providing an example based on the facts of *Hartford Fire*). For example, within the context of Helms-Burton, suppose that France passes a law that mandates certain French companies engage in trade and commercial activities with Cuba that would be considered trafficking violations of Helms-Burton. This scenario, while unlikely, would constitute a "true" conflict because France is requiring certain French corporations to engage in a particular activity that directly conflicts with Helms-Burton.

91. *See Hartford Fire*, 509 U.S. at 799; *see also Metro Indus.*, 82 F.3d at 847 (examining the application of the direct conflict test). For example, assume that a French company voluntarily engages in commercial activities in Cuba that violate Helms-Burton and the company is sued by the former American owner of the property. France then enacts various blocking statutes to bar the recognition of extraterritorial assertion of jurisdiction by courts of the United States. The French company, therefore, would be unable to simultaneously comply with both the French blocking statute and U.S. law and, therefore, would be in a true conflict. *See* Fairley, *supra* note 20, at 31-32 (analyzing Canadian blocking legislation enacted to counter Helms-Burton under this interpretation).

92. *See* Lowenfeld, *supra* note 90, at 45-47 (examining the views of the Supreme Court regarding the true conflict standard). American plaintiffs under Helms-Burton would favor the first interpretation, while foreign defendants would favor the second.

93. *Hartford Fire*, 509 U.S. at 798-99 (determining that a foreign defendant's compliance with a U.S. District Court order did not create a direct conflict with the foreign blocking statutes and policies of the defendant's country).

94. *See* A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 258-62, 267-80 (1981) (discussing the historical evolution of British blocking legislation and the conflicts between the United States and United Kingdom over the assertion of extraterritorial jurisdiction); R. Edward Price, *Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad*, 28 GEO. WASH. J. INT'L L. & ECON. 315, 322-26 (1995) (providing a history of foreign blocking statutes and explaining the different types).

95. *See* Price, *supra* note 94, at 325-26 (describing the different types of blocking statutes). Britain, Australia, South Africa, and New Zealand all have blocking statutes designed to prohibit compliance with foreign (United States) measures that attempt to

ing country's citizens and corporations from complying with United States court discovery orders and enforcement mechanisms to obtain judgments.[96] To enforce such prohibitions, blocking statutes typically subject citizens attempting to comply with United States court orders to civil penalties or monetary sanctions.[97]

In *Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*,[98] the Supreme Court examined a French blocking statute that precluded French citizens from disclosing evidence to United States courts.[99] The Court held that the French blocking statute did not preclude a United States court from ordering a foreign party subject to the court's jurisdiction to produce evidence, even if producing the evidence violated the blocking statute.[100] The Court stated that international comity should be used only to determine the extraterri-

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regulate or control international trade. The primary method to frustrate the exercise of jurisdiction is the prohibition of providing documents or information in response to discovery requests from foreign (United States) courts. *See* P.M. Roth, *Reasonable Extraterritoriality: Correcting the "Balance of Interests,"* 41 INT'L & COMP. L.Q. 245, 253 (1992) (examining the international version of the effects doctrine and suggesting moderation in the exercise of extraterritorial jurisdiction).

An example of such a blocking statute is Canada's Foreign Extraterritorial Measures Act (FEMA). R.S.C., ch. F-29, §§ 1-11 (1984)(Can.). FEMA was initially promulgated after the *Alcoa* decision to block the extraterritorial extension of U.S. antitrust laws to Canadian businesses; however, it has been used solely to counter the U.S. embargo on Cuba and its anti-Cuban trade measures. *See* Tim Kennish & Elizabeth Shriver, *Foreign Blocking Legislation—Canada*, Remarks at the American Conference Institute Program "Beyond Cuba; United States International Business Restrictions: Compliance with Libertad and Other Controls" (June 24, 1996). In response to Helms-Burton, Canada amended FEMA with the Foreign Extraterritorial Measures (United States) Order (FEMO). R.S.C., ch. F-29 (1984), amended by 1996 S.C. 611 (Can.). FEMO directs Canadian businesses and their officers not to comply with an extraterritorial measure of the United States that affects trade or commerce between Canada and Cuba. *See id.* at 612-13. Mexico has enacted similar legislation to block the application of Helms-Burton. *See Mexican Senate Approves Law Countering Helms-Burton Measure*, 13 Int'l Trade Rep. (BNA) No. 38, at 1496-97 (Sept. 25, 1996) (reporting the passage of Mexican blocking legislation enacted specifically to counter Helms-Burton).

96. *See* GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 367-73 (2d ed. 1992) (examining foreign blocking legislation enacted specifically in response to U.S. court discovery orders); Najeeb Samie, *Extraterritorial Enforcement of United States Antitrust Laws: The British Reaction*, 16 INT'L LAW. 313, 314 (1982) (noting that U.S. courts assert jurisdiction over foreign parties regardless of the existence of foreign blocking statutes); Mark Brodeur, Note, *Court Ordered Violations of Foreign Bank Secrecy and Blocking Laws: Solving the Extraterritorial Dilemma*, 1988 U. ILL. L. REV. 563, 569 (describing the two types of blocking statutes and explaining the government's oversight role in their enforcement).

97. *See* Price, *supra* note 94 at 325-26 (explaining the purpose and different types of foreign blocking statutes).

98. 482 U.S. 522 (1987).

99. *See id.* at 543-47 & n.29.

100. *See id.* at 543-46 & n.29.

torial reach of United States discovery orders in cases where international legal conventions of evidence apply.[101]

The Court's interpretation and handling of foreign blocking statutes in *Aerospatiale*, coupled with the Court's analysis in *Hartford Fire*, implies that true conflicts must entail either dire repercussions for the foreign defendant or serious ramifications for United States foreign relations.[102] Under this interpretation, a foreign party's mere inconvenience of having to choose between sanctions for violating a foreign blocking statute, or sanctions for not complying with a United States court order, will not ordinarily be considered a true conflict.[103]

B. Extraterritorial Assertion of Personal Jurisdiction: Due Process Protection Does Not Disappear

Although a clear showing of congressional intent to apply United States laws extraterritorially will defeat international law arguments advanced in United States courts,[104] Congress and the courts may not disregard constitutional due process protections afforded foreign defendants haled into United States courts.[105] The Due Process Clause protects de-

101. *See id.* at 543-44; *see also* Born, *supra* note 9, at 49 (explaining the application of discovery provisions of the Federal Rules of Civil Procedure in regard to the *Aerospatiale* decision within an international context).

102. *See* Dam, *supra* note 1, at 311 (examining *Aerospatiale* and the Court's interpretation of true conflicts and international comity analysis).

103. *See* Lowenfeld, *supra* note 90, at 46-47 (explaining the *Hartford Fire* majority's interpretation of the true conflict test).

104. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 224, 248 (1991) ("[L]egislation of Congress, *unless a contrary intent appears*, is meant to apply only within the territorial jurisdiction of the United States.") (emphasis added); Commodities Futures Trading Comm'n v. Nahas, 738 F.2d 487, 495 (D.C. Cir. 1984) ("Federal courts must give effect to a valid, unambiguous congressional mandate, even if such effect would conflict with another nation's laws or violate international law."); United States v. Pinto-Mejia, 720 F.2d 248, 259 (2d Cir. 1983) ("As long as Congress has expressly indicated its intent to reach conduct [occurring outside the United States], 'a United States court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment.'" (quoting *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972)); Pacific Seafarers, Inc. v. Pacific Far E. Line, Inc., 404 F.2d 804, 812 n.20 (D.C. Cir. 1968) (finding that the courts' obligation to follow congressional intent is greater than its obligation to follow principles of international law to promote harmony, except when Congressional intent runs contrary to constitutional mandates).

105. *See* United States v. Thomas, 893 F.2d 1066, 1068 (9th Cir. 1990) (observing that the application of a congressional statute cannot violate the Due Process Clause of the Fifth Amendment); Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos, 712 F. Supp. 383, 390 (1989) (stating that Congress cannot "override the constitutional due process constraints underlying personal jurisdiction"); *cf.* Restatement (Third) Foreign Relations Law § 403(2), at 244-45 (1987) (stating when the exercise of extraterritorial jurisdiction would be unreasonable); *see also infra* notes 110-30 and accompanying text (discussing the due process protections afforded foreign defendants haled into U.S. courts).

fendants from unfair and unreasonable jurisdictional assertions.[106] A foreign defendant haled into the United States court system is entitled to the same due process protections afforded United States citizens.[107] Thus,

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The foundation for the exercise of personal jurisdiction was established by the Supreme Court in *Pennoyer v. Neff*. 95 U.S. (5 Otto) 714 (1878). In *Pennoyer*, the Court used principles of international law in finding that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [And] no State can exercise direct jurisdiction and authority over persons or property without its territory." *Id.* at 722; *see also* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 32-39 (1990) (examining the *Pennoyer* case, the "territorial principle," and the historical evolution of the constitutional legal principles governing personal jurisdiction); Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 480-90 (1987) (examining the history of the *Pennoyer* case and then tracing the development of modern jurisdiction jurisprudence).

106. *See* U.S. CONST. amend. V. ("No person shall be. . . deprived of life, liberty, or property, without due process of law . . . ."); *see also* Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701-03 (1982) ("The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." (citing Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938) and Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 465 (1874))); International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (holding that a defendant must have sufficient contacts with the forum before a forum court can exercise personal jurisdiction); Brilmayer & Norchi, *supra* note 8, at 1224-39 (examining the evolution of state and federal extraterritoriality and concluding that the Fifth Amendment Due Process Clause limits federal acts, just as the Fourteenth Amendment Due Process Clause limits state action); Peter A. Diana & J. Michael Register, Recent Development, *Personal Jurisdiction In Flux:* Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee, 69 CORNELL L. REV. 136, 137-43 (1983) (discussing the due process limitations, originating from both the Fifth and Fourteenth Amendments, upon the exercise of personal jurisdiction).

107. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 268-69 (1990) (stating that the word "person" in the Fifth Amendment should be defined as a relatively universal term). The Supreme Court recognized the importance of extending jurisdiction to nonresident defendants in *Hanson v. Denckla*. 357 U.S. 235 (1958). The Court stated, "As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. . . . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." *Id.* at 250-51; *see also*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413-14 (1984) ("The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant."); Galvan v. Press, 347 U.S. 522, 530 (1954) (holding that foreign defendants are entitled to due process protection); Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1362 (7th Cir. 1985) ("Countless cases assume that foreign companies have all the rights of U.S. citizens to object to extraterritorial assertions of personal jurisdiction."); Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1315 (9th Cir. 1985) ("When a federal district court is sitting in diversity . . . due process requires that the defendant have some 'contacts, ties or relations' with the forum state. . . . Where a federal statute . . . confers nationwide service of process, 'the question becomes whether the party has sufficient contacts with the United States. . . .'").

Even though federal courts have rarely addressed this issue, it does not mean that due process limitations on the extraterritorial application of U.S. law do not exist. *See* United States v. Davis, 905 F.2d 245, 248 (9th Cir. 1990) ("In order to apply extraterritorially a

when examining legislation clearly intended to have an extraterritorial effect, the requirements of subject matter jurisdiction and personal jurisdiction must be distinguished.[108] Congress's power to link personal jurisdiction to subject matter jurisdiction is constrained by the Due Process Clause in order to protect foreign defendants from arbitrary and unfair litigation.[109]

1. Minimum Contacts Requirements

The cornerstone of jurisdictional due process is that a nondomicilliary party who is not served with legal process within the borders of the forum state must have minimum contacts with the forum attempting to exercise personal jurisdiction, so that maintaining the action "does not offend 'traditional notions of fair play and substantial justice.'"[110] The Due Process Clause does not allow a United States court to exercise personal ju-

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federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States so that such application would not be arbitrary or fundamentally unfair.") (citation omitted); *see also* Ellencrig, *supra* note 51, at 370 (examining Rule 4(k) of the Federal Rules of Civil Procedure, which allows for the extraterritorial jurisdiction of U.S. courts over foreign defendants when an action is brought under federal law).

108. *See* Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572, 580-81 (2d Cir. 1993) ("[Legislation] cannot create personal jurisdiction where the Constitution forbids it."); Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari, 810 F. Supp. 1375, 1388-89 (S.D.N.Y. 1993) (subject matter jurisdiction analysis and constitutional due process analysis should be conducted separately); *Walpex Trading*, 712 F. Supp. at 390 ("Congress did not have the authority to override the constitutional due process constraints underlying personal jurisdiction when it drafted the FSIA.").

109. *See* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 307 (2d Cir. 1981) (stating that a federal statute attempting to merge personal jurisdiction into subject matter jurisdiction is prohibited by the Due Process Clause); Haugen, *supra* note 54, at 111-14 (examining the Supreme Court's position that the Due Process Clauses of the Fifth and Fourteenth Amendments protect foreign defendants from unreasonable assertions of jurisdiction by U.S. courts).

110. *International Shoe*, 326 U.S. at 316; *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) ("[T]he constitutional touchstone [of the determination of whether the exercise of personal jurisdiction comports with due process] remains whether the defendant purposefully established 'minimum contacts' in the forum State."). While the Court in *International Shoe* addressed due process limitations within the context of the Fourteenth Amendment, as opposed to the Fifth Amendment, the legal analysis remains the same under either of the due process clauses. *See* Murray S. Levin, *Judicial Jurisdiction in International Civil Litigation*, 6 INT'L Q. 66, 76 (1994) ("United States courts have generally applied the same, basic due process standards developed in domestic cases . . . to international cases."). *See generally* Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1034-37 (1995) (criticizing *International Shoe* and its application); Silberman, *supra* note 56, at 756-57 (explaining the constitutional analytic framework in *International Shoe*).

risdiction over a person or corporate entity that does not have "contacts, ties, or relations" to that forum.[111]

The Supreme Court developed a two-pronged test to determine the validity of exercising personal jurisdiction in *International Shoe v. Washington*.[112] The first prong requires courts to examine the nature and quality of the defendant's contacts with the forum under a reasonableness test.[113] The second prong tests the sufficiency of contacts of the connec-

111. *International Shoe*, 326 U.S. at 319. Several courts have created a minimum contacts test specifically to determine if activities of a foreign corporation related to the United States satisfy the due process standard. The Second Circuit articulated the following factors: (1) transacting business in the United States, (2) doing an act in the United States, or (3) having an effect in the United States by an act done elsewhere. *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972) (explaining the Second Circuit's minimum contacts test for foreign corporations); *see also* Eskofot v. E.I. du Pont de Nemours & Co., 872 F. Supp. 81, 87-88 (S.D.N.Y. 1995) (explaining and applying the Second Circuit's minimum contacts test for foreign corporations).

112. 326 U.S. 310 (1945). In *International Shoe*, a Delaware corporation, with its principal place of business in St. Louis, Missouri, manufactured and sold shoes in a variety of states. *See id.* at 313. It did not maintain an office or store merchandise in the state of Washington, but did employ thirteen salesmen to promote and sell its goods. *See id.* The state of Washington brought an action against International Shoe Co. to recover unpaid unemployment contributions required by state statute. *See id.* at 311. International Shoe Co. objected to the assertion of jurisdiction by the Washington court, contending that it did not have "presence" within the state and therefore was protected by the Due Process Clause of the Fourteenth Amendment from unreasonable assertions of jurisdiction. *See id.* at 315. The Supreme Court held that International Shoe Co. had "rendered itself amenable to suit upon obligations arising out of its activities of the salesmen in Washington . . . . The state thus has constitutional power to . . . subject [the company] to a suit . . . . " *Id.* at 322; *see* Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 786-96, 805-17 (1995) (providing a detailed summary of the facts of *International Shoe* and the Supreme Court's opinion).

113. *See International Shoe*, 326 U.S. at 316-19; *see also infra* notes 135-38. The factors used under the first prong to determine the reasonableness of exercise of jurisdiction were expanded upon in succeeding cases. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (establishing the "reasonably foreseeable requirement" in which it must be reasonably foreseeable that the defendant may be haled into the forum's court); Hanson v. Denckla, 357 U.S. 235, 253 (1958) (establishing the "purposeful availment" requirement in which a defendant's actions afford it the "benefits and protection" of the forum state's laws); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (holding that jurisdiction is valid when a defendant's actions create a "substantial connection" with the forum state).

Today, there are numerous factors used by courts in determining whether the assertion of jurisdiction over a foreign defendant would offend "traditional notions of fair play and substantial justice," including: (1) the benefits and protections of the forum state's laws; (2) the regularity and continuous systematic dealings in the forum state; (3) if the activities arose out of contacts in the forum state; (4) if the activities were substantial; (5) the defendant's convenience in litigating in the forum state; (6) the existence of an appropriate long-arm statute; (7) the economic benefit derived from adjudicating the suit; and (8) the quality and nature of the defendant's activities in the forum state. *See* Asahi Metal Indus.

tion between the cause of action and the contacts with the forum.[114] In subsequent cases, the Supreme Court has emphasized that involuntary contacts with a United States forum do not satisfy the minimum contacts test.[115]

The Supreme Court created two factors to aid its analysis under the second prong of the minimum contacts test in *World-Wide Volkswagen Corp. v. Woodson*.[116] First, the defendant must have "purposefully avail[ed]" himself of the protections and benefits of the forum state's law.[117] Second, it must be deemed reasonably foreseeable that the defendant would be haled into a court of the forum state.[118] In *World-Wide Volkswagen*, the Court stated that these two factors may be satisfied if the claims are "related to" or "arise from" a nonresident defendant's contacts with the forum state.[119] This language was the precursor to the development of "specific [personal] jurisdiction" later defined by the Court.[120]

Co. v. Superior Ct., 480 U.S. 102, 113 (1987) (stating the factors used by the Court under the reasonableness prong of its minimum contacts analysis).

114. *See International Shoe*, 326 U.S. at 316-19; *see also infra* notes 116-20 and accompanying text (explaining the factors used in the second prong of the minimum contacts analysis).

115. *See Hanson*, 357 U.S. at 253 (stating that the defendant must have purposefully availed himself of the privilege of acting in the forum state so as to invoke the benefits and protections of the forum's laws).

116. 444 U.S. 286 (1980). In *World-Wide Volkswagen*, plaintiffs traveling from New York were injured in a car accident in Oklahoma. *See id.* at 288. Plaintiffs brought a products liability suit in Oklahoma against the defendants, a retail car dealer and a regional distributor, located in New York and New Jersey, respectively. *See id.* at 289. The Court conducted a two pronged minimum contacts analysis. *See id.* at 292-94. *See generally* Charles W. Adams, World-Wide Volkswagen v. Woodson—*The Rest of the Story*, 72 NEB. L. REV. 1122, 1152-55 (1993) (examining the significance of the case today in the context of personal jurisdiction analysis).

117. *World-Wide Volkswagen*, 444 U.S. at 297 (repeating the purposeful availment requirement (citing *Hanson*, 357 U.S. at 253)). *See generally* Winton D. Woods, Carnival Cruise Lines v. Shute: *An Amicus Inquiry Into The Future of "Purposeful Availment,"* 36 WAYNE L. REV. 1393, 1407-12 (1990) (surveying the court's application of the purposeful availment requirement).

118. *See World-Wide Volkswagen*, 444 U.S. at 297. The only relevant foreseeability is whether the defendant could foresee litigation based on his conduct and connection with the forum. *See id.* This concept is also described as "litigative foreseeability." *See* Adams, *supra* note 116, at 1154 (explaining that the standard of reasonable foreseeability was created to determine whether the minimum contacts requirement was satisfied for a nonresident defendant and remains the "governing standard for minimum contacts in personal jurisdiction cases.").

119. *World-wide Volkswagen*, 444 U.S. at 292.

120. *See id.* The rationale for this rule is that modern means of transportation, communication, and conducting business has reduced earlier obstacles to defending suits brought in other states. *See id.* at 295 (citing commentary in *Hanson v. Denckla*); *see also* Mark M. Maloney, Note, *Specific Personal Jurisdiction and the 'Arise from or Relate to' Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265, 1272-75 (1993) (explaining the

2. Two Types of Personal Jurisdiction: General and Specific

After *World-Wide Volkswagen*, the Supreme Court recognized and distinguished two types of personal jurisdiction: "general jurisdiction" and "specific jurisdiction." In *Helicopteros Nacionales de Columbia, S.A. v. Hall*,[121] the Court explained that general jurisdiction is based upon the defendant's contacts with the forum as a whole.[122] Under general jurisdiction, a United States court may hear a claim against a defendant regardless of the claim's relation to the contacts with the forum.[123] The jurisdictional nexus in federal question cases is the foreign defendant's "continuous and systematic" contacts with the United States as a whole, and not its specific contacts within the territorial boundaries of the forum court.[124] Echoing *World-Wide Volkswagen*, the Court defined specific jurisdiction as "jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum."[125]

The exercise of general jurisdiction requires a higher minimum contacts threshold than specific jurisdiction.[126] To assert general jurisdiction in

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Court's jurisdictional analysis in *Helicopteros* which led to the creation of general and specific jurisdictions).

121. 466 U.S. 408 (1984); *see id.* at 414 n.9 (defining "general jurisdiction" and "specific jurisdiction"). In *International Shoe*, the Court first implicitly acknowledged the existence of general and specific jurisdiction, but failed to provide further guidance on the differences and legal standards between them. 326 U.S. at 317 ("defendant's 'continuous and systematic' activities confer jurisdiction to adjudicate causes of action unrelated to forum activities, whereas 'single or isolated' acts at best permit the exercise of jurisdiction to adjudicate consequences of these very acts.").

122. *Helicopteros*, 466 U.S. at 414 n.9; *see also* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) (establishing the "continuous and systematic" contacts requirement for the exercise of general jurisdiction); Weintraub, *supra* note 53, at 537-39 (examining the requirements for "continuous and systematic contacts").

123. *See Helicopteros*, 466 U.S. at 414-15.

124. *See id.* (clarifying the number of contacts necessary to establish general jurisdiction). The "continuous and systematic" contacts language was first used by the Supreme Court in an earlier case, *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), where the Supreme Court upheld the exercise of jurisdiction over a foreign corporation, even though the cause of action did not arise out of the foreign defendant's activities within the forum state. *See id.* at 438, 445. In *Perkins*, a Philippine corporation conducted administrative activities in Ohio due to the Japanese occupation of the Philippines during World War II. *See id.* at 447-48. Even though the cause of action did not arise out of its activities in Ohio, the Supreme Court held that the foreign defendant was "carrying on . . . a continuous and systematic . . . part of its general business" within the state, and therefore it was reasonable and just for the forum court to exercise personal jurisdiction. *See id.* at 438.

125. *See Helicopteros*, 466 U.S. at 414 n.9.

126. *See Perkins*, 342 U.S. at 445-48; *see also* Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 727-28 (1988); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 631, 633-34 (1988) (concluding most courts require more substantial contacts to exercise general jurisdiction); Pierre Riou, Note, *General Jurisdiction over Foreign Corporations: All That Glitters is not Gold Issue Mining*, 14

federal question cases, the party being subjected to the court's authority must have continuous and systematic contacts with the United States, thereby deriving the benefits and protections of United States law.[127] The party does not need to have contact with the specific forum of the court exercising jurisdiction.[128]

In determining whether continuous and systematic contacts exist, courts examine whether the nonresident or foreign defendant has a regular place of business in the United States, is licensed to do business in the United States, or has other substantial, continuous, and systematic contacts within the United States.[129] These inquiries have been criticized for being both too broad and too narrow, because most United States courts have difficulty articulating and applying the factors within the *International Shoe* framework.[130]

REV. LITIG. 741, 769-75 (1995) (examining the "continuous and systematic contacts" requirement of general jurisdiction).

127. *See Helicopteros*, 466 U.S. at 414-16 (analyzing the contacts necessary to satisfy due process requirements); *see also* Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1252 (9th Cir. 1980) ("[I]t is not the quantity, but rather the 'nature and quality' of the defendant's activities which determine whether extension of jurisdiction offends due process.").

128. *See Helicopteros*, 466 U.S. at 414-15; *see also* Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 534 (S.D. Tex. 1994) (explaining that contacts with the forum as a whole must be substantial as well as continuous and systematic); Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1330-31 (9th Cir. 1984) (analyzing defendant's contacts with a forum state to determine whether they were sufficient to establish general jurisdiction).

In assessing the sufficiency of the contacts to determine if these contacts are "continuous and systematic," federal courts most often rely on the following factors:

> [T]he extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit.

Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1987); *see also* Debra Windsor, Comment, *How Specific Can We Make General Jurisdiction: The Search For A Refined Set Of Standards*, 44 BAYLOR L. REV. 593, 606-13 (1992) (examining other federal circuits' tests for general jurisdiction).

129. *See* Obenchain Corp. v. Corporation Nacionale de Inversiones, 656 F. Supp. 435, 440-41 (W.D. Penn. 1987) (applying the *Texas Trading* factors to general jurisdiction analysis); Meadows v. Dominican Republic, 628 F. Supp. 599, 606-07 (N.D. Cal. 1986) (same); Schmidt v. Polish People's Republic, 579 F. Supp. 23, 28 (S.D.N.Y. 1984) (same).

130. *See* Juenger, *supra* note 53, at 4, 7 (describing the quagmire of lower court decisions addressing jurisdictional principles); Silberman, *supra* note 56, at 764-66 (explaining that there has been little legislative or judicial guidance in formulating criteria for general jurisdiction analysis).

3. *The Supreme Court Obscures Jurisdictional Analysis*

In *Asahi Metal Industry Co. v. Superior Court*,[131] the Supreme Court held that the assertion of specific personal jurisdiction was unreasonable despite a foreign defendant's minimum contacts with California.[132] The Supreme Court in *Asahi* attempted to clarify proper assertion of personal jurisdiction over foreign defendants,[133] but the Court only succeeded in confusing jurisdictional analysis by failing to establish a clear and coherent analytic framework.[134]

Eight justices agreed that the first prong of the jurisdictional analysis is the "reasonableness" of asserting jurisdiction, and that this prong is analyzed based on the traditional factors established in *International Shoe*.[135] In his concurrence, Justice Brennan articulated five factors that should be used in determining whether the exercise of jurisdiction is reasonable and fair:[136] (1) the burden placed on the defendant; (2) the United States forum's interests; (3) the plaintiff's interest in obtaining a remedy; (4) the United States judicial system's interest in promoting judicial economy; and (5) the common interest of the states in furthering fundamental social policies.[137]

The Court, however, split four to four on the appropriate standard for the second prong of minimum contacts analysis.[138] Emphasizing different factors from *World-Wide Volkswagen*, the two pluralities suggested different rationales for reaching the Court's judgment.[139] One opinion, written

131. 480 U.S. 102 (1987).

132. *See id.* at 113-16.

133. *See id.* at 105. In *Asahi*, plaintiffs who were injured in a motorcycle accident due to allegedly defective parts in a tire, brought suit in a California court against the Taiwanese tire tube manufacturer and Asahi, a Japanese valve assembly manufacture. *See id.* at 105-06. The plaintiffs settled out of court but the Taiwanese defendant maintained its cross-claim against Asahi. *See id.* at 106. The California court held that jurisdiction was valid upon Asahi because, even though it did not directly or purposefully import its products into the United States, it was foreseeable that its products might end up in the United States. *See id.* at 107. The Court of Appeals of California reversed but the California Supreme Court held that the exercise of jurisdiction was reasonable. *See id.*

134. *See infra* notes 142-47 and accompanying text (discussing the confusion existing in the lower courts' jurisdictional analyses after *Asahi*).

135. *See Ashai*, 480 U.S. at 113. Reasonableness is determined through a balance of interests test that analyzes five factors. *See id.* (citing *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 292 (1980)).

136. *See id.* at 116-17; *see also* Weintraub, *supra* note 53, at 539-40 (explaining the complexities of personal jurisdiction analysis and suggesting more efficient methods to analyze jurisdiction in an effort to reduce confusion and aid judicial economy).

137. *See Asahi*, 480 U.S. at 113.

138. *See id.* at 108-16 (O'Connor, J., plurality opinion), 116-20 (Brennan, J., concurring in part).

139. *See id.* at 116 (Brennan, J., concurring in part).

by Justice O'Connor, focused on the purposeful availment requirement.[140] The other opinion, written by Justice Brennan, focused on the litigative foreseeability requirement.[141]

This lack of a consensus has further confused what analysis United States courts should use in determining the validity of exercising personal jurisdiction over foreign or nonresident defendants.[142] Due to the absence of a clear jurisdictional analytical framework, federal courts continue to intertwine the factors used in both general and specific personal jurisdictional analyses.[143] This confusion has led the lower federal and state courts to develop of a wide variety of analytical frameworks.[144]

Lower courts have remained consistent in applying the factors employed under the first prong of the analysis to evaluate the reasonableness of asserting jurisdiction.[145] After *Asahi*, however, courts have had difficulty in evaluating the sufficiency of the defendant's contacts with the forum under the second prong.[146] Unfortunately, the courts have developed a sufficiency of contacts test that borrows requirements and factors

140. *See id.* at 108-13 (O'Connor, J., plurality opinion).

141. *See id.* at 116-20 (Brennan, J., concurring in part).

142. *See* Juenger, *supra* note 53, at 2-4 (examining the current chaos that reigns in the U.S. law of jurisdiction and the effects upon the international community of America's "unenlightened parochialism" for disregarding international models for determining the exercise of jurisdiction).

143. *See* Payne v. Motorists' Mut. Ins. Cos., 4 F.3d 452, 455 (6th Cir. 1993) (creating a three part test for personal jurisdiction in the absence of continuous contacts between the defendant and the forum); Madara v. Hall, 916 F.2d 1510, 1515 (11th Cir. 1990) (noting that jurisdiction should be determined based on the facts of each case, not through a jurisdictional analysis); *see also* Maloney, *supra* note 120, at 1276-86 (explaining the two primary tests used by courts to analyze the "arise from or relate to" requirement).

144. *See* Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 614 (8th Cir. 1994) (rejecting Justice O'Connor's *Asahi* opinion); Ham v. La Cienega Music Co., 4 F.3d 413, 415 (5th Cir. 1993) (stating that the Fifth Circuit will continue to follow pre-*Asahi* precedent absent a clear Supreme Court majority).

145. *See* Levin, *supra* note 110, at 77-78 (examining the lower courts' application of the reasonableness prong of the minimum contacts analysis); *see also supra* note 113 (examining the factors courts use for their analysis under the reasonableness inquiry of the minimum contacts test).

146. *Compare* Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369, 374-75 (8th Cir. 1990) (applying Justice O'Connor's approach to the second prong of the minimum contacts analysis), *with* Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383, 385-86 (5th Cir. 1989) (applying Justice Brennan's approach to the second prong of the minimum contacts analysis); *see also* Levin, *supra* note 110, at 78-79 (examining the lower courts division regarding the application of the "purposeful availment" test); Bruce Posnak, *The Court Doesn't Know Its* Asahi *from Its* Wortman*: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 885-86, 901-02 (1990) (criticizing the courts' sufficiency of contacts tests for having "too many complicated and uncertain variables").

developed to address either general or specific jurisdiction, as well as the factors used to determine reasonableness.[147]

4. *Articulating a Coherent Analytical Framework for the Second Prong of the Minimum Contacts Analysis*

Although the lower courts have been unable to agree on an appropriate analytical framework for the second prong of the minimum contacts analysis, the Second Circuit articulated a coherent approach in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*.[148] The Second Circuit explained that in determining whether a foreign defendant's contacts with the forum are sufficient to exercise valid personal jurisdiction, a court must evaluate four factors: (1) the degree to which the defendants availed themselves of the benefits of United States law; (2) the foreseeability of litigating in the United States; (3) the defendants' inconvenience in litigating in the United States; and, (4) the interests of the United States in adjudicating the suit.[149]

In the absence of a more coherent analytical framework for determining the validity of the exercise of personal jurisdiction, this Comment will apply these four factors for analysis under the sufficiency of contacts second prong of the traditional two-step analysis in evaluating jurisdictional issues raised by the extraterritorial application of Helms-Burton.[150]

III. Due Process and Direct Conflicts: Searching For Reasonable Limitations on Extraterritorial Legislation Under Current Legal Standards

Given the lack of guidance and coherence provided by the Supreme Court regarding due process and extraterritorial jurisdiction analysis, it is difficult to determine the practical limitations on the exercise of extraterritorial personal jurisdiction under Helms-Burton or similar extraterritorial federal legislation.[151] Several due process issues are raised by Helms-

147. *See supra* note 113 (stating the various factors developed to address minimum contacts analysis).

148. 647 F.2d 300 (2d Cir. 1981).

149. *See id.* at 314-15 (citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

150. Many federal district courts have cited and applied the *Texas Trading* analytic framework. *See* Obenchain Corp. v. Corporation Nacionale de Inversiones, 656 F. Supp. 435, 440-41 (W.D. Pa. 1987) (applying the *Texas Trading* factors to general jurisdiction analysis); Meadows v. Dominican Republic, 628 F. Supp. 599, 606-07 (N.D. Cal. 1986) (same); Schmidt v. Polish People's Republic, 579 F. Supp. 23, 26-27 & n.3 (S.D.N.Y. 1984) (same).

151. *See supra* notes 142-47 and accompanying text (examining the *Asahi* opinion and its impact on lower courts' analysis of personal jurisdiction); *see also supra* note 49 (ex-

Burton's imposition of extraterritorial jurisdiction over foreign companies engaged in "trafficking" in Cuban property, and the Due Process Clause may limit the extraterritorial application of Title III in certain situations.[152] Accordingly, defendants haled into United States courts under Title III of Helms-Burton may successfully challenge, on due process grounds, a United States federal court's exercise of personal jurisdiction.[153]

A. Illustrative Examples

Helms-Burton applies to foreign corporations involved in the trafficking of confiscated United States property in Cuba.[154] Importantly, almost all business ventures in Cuba will entail a joint venture between a foreign corporation and the Cuban government.[155] Because the Act's definition of trafficking is extremely broad,[156] it conceivably covers any commercial activity arising out of confiscated property. The following examples illus-

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plaining that personal jurisdiction under Helms-Burton was intended by Congress to be guided by existing legal principles).

152. *See supra* notes 104-09 and accompanying text (discussing the constitutional limitations upon extraterritorial legislation).

153. *See infra* notes 210-13 and accompanying text (analyzing the constitutional limitations upon the exercise of personal jurisdiction over certain foreign defendants haled into court under Helms-Burton).

The due process challenges to Helms-Burton may closely parallel litigation which arose from the application of the commercial activities exception of the FSIA. *See supra* note 49 (discussing possible similarities in litigation under the Helms-Burton Act and the FSIA). The commercial activities exception broadly imposes liability upon a foreign sovereign engaged in commercial conduct abroad that has a direct detrimental effect within the United States. Congress did not articulate any limitations upon the commercial activities exception's broad application, and due process arguments have been advanced by foreign defendants seeking dismissal of the lawsuit on the basis of lack of personal jurisdiction and that the exercise of extraterritorial jurisdiction by United States courts violated due process. *See* Hounduras Aircraft Registry, Ltd. v. Government of Honduras, 883 F. Supp. 685, 687-89 (S.D. Fla. 1995); AMPAC Group Inc. v. Republic of Honduras, 797 F. Supp. 973, 975, 978-79 (S.D. Fla. 1992); *see also* International Housing Ltd. v. Rafidain Bank Iraq, 712 F. Supp. 1112, 1117-19 (S.D.N.Y. 1989) (holding that a foreign bank haled into a U.S. court under the commercial activities exception of the FSIA did not have requisite minimum contacts with the United States to justify the exercise of personal jurisdiction). In *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), the Supreme Court recognized that lawsuits brought under the commercial activities exception of the FSIA may not always satisfy due process requirements for personal jurisdiction. *See id.* at 619.

154. *See* Pub. L. No. 104-114, § 4(11), 110 Stat. 785, 790-91 (defining a person as including any entity).

155. *See* First, *supra* note 49, at 300-29 (examining Cuba's recent foreign investment law which promotes the formation of joint ventures between foreign companies and the Cuban government); Shari-Ellen Bourque, Note, *The Illegality of the Cuban Embargo in the Current International System*, 13 B.U. INT'L L.J. 191, 199-203 (1995) (examining the Cuban Joint Venture Law).

156. *See supra* note 41 and accompanying text (defining trafficking under Title III).

trate the expansive extraterritorial reach of Title III.[157] These examples will be used to assess the potential limitations of Helms-Burton based on due process arguments that may be advanced by foreign defendants seeking dismissal of a Title III lawsuit. Such an argument would challenge the United States federal court's ability to exercise valid personal jurisdiction.

1. Basic Trafficking Violations Under Title III

A foreign, non-Cuban company that engages in commercial activity in Cuba, such as manufacturing a product, building an industrial plant, or financing a vacation resort, on property confiscated and expropriated from an United States owner by the Castro regime, undoubtedly would be considered to be "trafficking" in violation of Title III.[158] The prior owner of the property, a United States citizen or corporation, could bring suit against the foreign company in a United States federal district court.[159]

For example, suppose a French company enters a joint-venture with the Cuban government to build and operate a sugar refinery plant. The French company buys or leases a sugar plantation from the Cuban government. The plantation is located on property once owned by U.S. Sugar Inc., a fictitious United States corporation, before it was confiscated and expropriated by the Castro regime in 1960. The French company builds and operates a sugar refinery plant on the property and engages in direct sales and exports of refined sugar. Under Helms-Burton, this is considered a straightforward trafficking violation of Title III.[160] The French company may be sued by U.S. Sugar Inc. to recover damages and, if U.S. Sugar Inc. has a pre-existing certified claim filed with the Foreign Claims Settlement Commission, it would be entitled to seek treble damages.[161]

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157. *See infra* notes 158-69 and accompanying text (illustrating the expansive extraterritorial reach of Title III).

158. *See* § 4(11),(13)(B), 110 Stat. at 790-91 (stating trafficking violations directly related to confiscated property).

159. *See* § 302(a)(1), 110 Stat. at 815 (stating that trafficking violators will be liable to the U.S. national with a claim to the confiscated property).

160. *See* § 4(13), 110 Stat. 790-91 (providing the definition of trafficking); § 302, 110 Stat. 815-19 (stating the private cause of action available to former American owners of expropriated Cuban property).

161. *See* § 302(a)(3)(C), 110 Stat. at 815-16 (stating the monetary damages that a certified claimant may pursue against a Title III trafficker); *supra* note 38 and accompanying text (discussing the preference given under Helms-Burton to certified claims with the FCSC). Concerning the certified claimants with the FCSC, American sugar companies have the greatest monetary certified claims, totalling several millions of dollars. *See* Travieso-Diaz, *supra* note 16, at app. A. For example, North American Sugar Industries,

2. *Trafficking Liability for Imports and Exports and/or Parent-Subsidiary Affiliations*

Helms-Burton also applies trafficking liability to activities that merely stem from the expropriated property.[162] A foreign, non-Cuban company that imports a product manufactured on confiscated land in Cuba would be considered to be trafficking under Helms-Burton.[163] This company would be exposed to a private cause of action under Title III by the United States citizen or corporation that previously owned the property.[164]

For example, if an Austrian candy company, located in Vienna or in another foreign country other than Cuba, imports sugar from Cuba and the sugar originated from the French-owned sugar plantation in the first example, the Austrian candy company is considered to be trafficking under Helms-Burton, regardless of whether the sugar is sold in Austria or as an export.[165] Liability under Title III may be found even if the Austrian company does not own any property in Cuba and is not engaged in any joint venture or other commercial activities in, or related to, Cuba.[166]

Moreover, if the Austrian candy company is a subsidiary corporation of, for example, a Swiss corporation, that Swiss foreign parent company could be considered to be profiting from the subsidiary's sale of its goods made with sugar imported from Cuba.[167] Therefore, the parent could also be considered to be trafficking in violation of Title III.[168] Thus, a

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Inc. has a certified claim of $97,373,415.00, for its property that was expropriated by the Castro regime; treble damages would amount to over 300 million dollars. Other U.S. sugar companies with certified claims include: United Fruit Sugar Company ($85,100,147.00), West Indies Sugar Corporation ($84,880,958.00), and the American Sugar Company ($81,011,240.00). *See id.* at app. A.

162. *See* § 4(13), 110 Stat. at 790-91 (stating that trafficking violations includes "otherwise benefiting from" and "otherwise engages in trafficking through another person"). The EU has vigorously protested the impact on the extraterritorial reach of Helms-Burton on indirect imports. *See EU Requests WTO Talks*, *supra* note 44, at 762 (discussing the EU's concern towards Helms-Burton's extraterritorial reach to indirect sugar imports, as well as direct imports, that include EU products imported to the United States that were made with sugar imported to the EU from Cuba).

163. *See* § 4(13), 110 Stat. at 791.

164. *See* § 302(a)(1), 110 Stat. at 815-17 (explaining the private right of action available for certified and noncertified claimants).

165. *See EU Requests WTO Talks*, *supra* note 44, at 762 (discussing the EU's concerns regarding Helms-Burton's extraterritorial reach).

166. *See supra* note 41 (setting forth Title III's definition of "trafficking").

167. *See* § 4(13), 110 Stat. at 790-91 (providing the Title III definition of trafficking).

168. *See Extraterritorial Subsidiary*, *supra* note 45, at 71-77 (examining U.S. courts' assertion of personal jurisdiction over foreign subsidiaries through their parent companies).

To extend the hypothetical even further, suppose a commodity trader at the London Commodities Exchange resells the Cuban sugar to a foreign company. The foreign company uses the sugar to manufacture candy. Then, the company uses its profits from its

foreign parent or a subsidiary company may be exposed to liability under Title III, even though it is not directly engaged in commercial transactions with Cuba involving expropriated United States property and has only remote ties to such property.[169]

B. Helms-Burton and Due Process Analysis

As demonstrated above, the potential extraterritorial reach of Helms-Burton is enormous. Subject matter jurisdiction exists for United States federal courts to adjudicate Helms-Burton lawsuits because Helms-Burton is a federal law expressing a clear congressional intent for extraterritorial application.[170] United States courts, however, still must determine whether due process protections apply to protect the foreign defendant from arbitrary or unfair assertions of jurisdiction.[171] In deciding whether the foreign defendant had minimum contacts with the United States so that the exercise of personal jurisdiction "does not offend traditional notions of fair play and substantial justice,"[172] courts will focus on (1) the nature and quality of the defendant's contacts with the United States (reasonableness); and, (2) the connection between the cause of action and those contacts (sufficiency of contacts).[173]

1. The Reasonableness Prong

Of the five factors Justice Brennan articulated in *Asahi* to determine the reasonableness of a determination of personal jurisdiction, three are particularly relevant to litigation in a United States court under Title III of Helms-Burton: (1) the burden on the defendant; (2) the interests of the United States; and, (3) the plaintiff's interest in obtaining relief.[174]

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candy sales to pay U.S. income taxes for its U.S. subsidiary. Technically, the U.S. government would be considered "profiting" from illegal trafficking under Helms-Burton and would therefore be open to suit by the former U.S. owner of the Cuban sugar plantation. *See* Marcus, *supra* note 47, at 13 (providing a similar hypothetical to the above to illustrate the over expansive reach of Title III).

169. *See* Desloge, *supra* note 17, at C4 (reporting that attorneys are targeting U.S. subsidiaries of foreign parent corporations engaged in joint ventures in Cuba which entail trafficking violations under Title III).

170. *See supra* note 22 and accompanying text (discussing the clear extraterritorial intent Congress provided in enacting Helms-Burton).

171. *See supra* notes 105-09 and accompanying texts (discussing legislation as limited by the due process clause and other constitutional considerations, and explaining that foreign persons, corporations, and sovereign entities have the same rights as U.S. citizens to object to a U.S. court's extraterritorial assertion of personal jurisdiction).

172. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

173. *See id.* at 319; *see also supra* notes 112-15 and accompanying text (discussing *International Shoe* and its two-pronged minimum contacts test).

174. *See* Ashai Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (citing World-Wide Volkswagen Corp. v. Woodsen, 444 U.S. 286, 292 (1980)). U.S. courts will

In assessing the first factor, considering the burden on the defendant haled into a United States court under Title III, a court most likely will examine the inconvenience to defendants litigating in the United States.[175] The United States court conducting personal jurisdiction analysis likely will focus on the burdens placed on the defendant and the international comity complications created by foreign blocking legislation.[176] For example, under the Canadian blocking statute, a Canadian company may suffer civil penalties and sanctions from Canada if the company submits to the jurisdiction of a United States court in a Helms-Burton lawsuit or reaches a settlement with a United States national bringing such an action.[177] This would put the Canadian defendant in the difficult position of choosing whether to violate United States or Canadian law.

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most likely defer to the congressional findings expressed in Helms-Burton that approximately $1.8 billion dollars of property was expropriated from U.S. citizens and that the purposes for enacting Helms-Burton were in part "to protect U.S. nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime." Pub. L. No. 104-114, § 3(6), 110 Stat. 785, 789. Such a deference to Congress will provide a finding of "direct effect" upon the United States, however, indirect trafficking violations may be still be open to attack. *See* Obenchain Corp. v. Corporation Nacionale de Inversiones, 656 F. Supp. 435, 440-41 (W.D. Pa. 1988) ("[A] mere economic impact on a United States plaintiff, without other contact by the foreign defendant with the United States, will not satisfy requirements of due process. . . ."); Colonial Bank v. Compagnie Generale Maritime et Financiere, 645 F. Supp. 1457, 1465 (S.D.N.Y. 1986) (declining to exercise jurisdiction for a claim brought under the FSIA by a party *indirectly injured* by commercial acts of a foreign state) (emphasis added).

175. *See Asahi*, 480 U.S. at 113; *see also* Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1412 (9th Cir. 1990) (holding that the exercise of personal jurisdiction over the foreign defendant would be unreasonable because of the burdens placed on the defendant in litigating in the United States); Congoleum Corp. v. DLW Aktiengesellschaft, 729 F.2d 1240, 1243 (9th Cir. 1984) (holding that the exercise of jurisdiction by a California court over a German corporation would be unreasonable when the claim arose from activities in Europe, and the German defendant's only contacts with California were the development of a sales market); Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 533-35 (S.D. Tex. 1994) (holding that the exercise of general jurisdiction in a tort action would be unreasonable, and offend traditional notions of fair play and substantial justice, because of the burden placed on the foreign defendant who merely supervised the design and manufacture of aircraft).

176. *See* Reebok Int'l Ltd. v. McLaughlin, 49 F.3d 1387, 1391-93 (9th Cir. 1995) (finding contacts necessary to support exercise of personal jurisdiction, but declining to do so because of the conflicting laws of the foreign defendant's country); *supra* notes 94-103 and accompanying text (explaining blocking statutes and Supreme Court's interpretation and treatment of them).

177. *See* John Urquhart, *Wal-Mart Puts Cuban Goods Back on Sale*, WALL ST. J., Mar. 14, 1997, at A3 (reporting that Canadian companies violating Helms-Burton face $1 million in fines in the United States and $1.1 million (U.S.) in fines in Canada if the company complies with the Act's provisions); *infra* notes 214-31 and accompanying text (discussing foreign blocking legislation and the complications it creates for defendants "caught in the middle" between U.S. law and the laws of their own country).

While foreign blocking legislation may be considered an unreasonable burden upon the foreign defendant, this legislation alone cannot be outcome determinative.[178] As previously discussed, after *Hartford Fire* a court merely needs to examine whether the assertion of subject matter jurisdiction would be a true conflict with a foreign law or policy.[179] The reasonable analysis, in regard to determining the validity of personal jurisdiction, shifts to examining whether the foreign blocking legislation was enacted to counter Helms-Burton by ordering mandatory continuance of knowing and intentional trafficking activities by its companies currently engaged in business in Cuba.[180]

Under *Asahi* 's second and third reasonableness factors, a court must examine the countervailing interest of the United States in hearing the suit and the plaintiff's interest in obtaining relief.[181] Plaintiffs will likely rely on Helms-Burton's stated purposes of protecting United States citizens' property rights and advancing United States foreign policy goals towards Cuba.[182] Courts will ordinarily conclude that these types of congressional findings establish a strong United States interest in hearing the suit.[183] In addition, plaintiffs generally will be able to establish that, without a domestic forum, their ability to obtain relief will be restricted.[184]

Although the reasonableness prong would be easy to establish under Helms-Burton, United States courts will still have to proceed to the second prong of the traditional minimum contacts test: the connection between the cause of action and the defendant's contacts with the United States.[185]

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178. *See supra* notes 113, 135-37 (examining *International Shoe* and the factors used by courts in succeeding cases to determine reasonableness).

179. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993); *see also* Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 846 n.5 (9th Cir.), *cert. denied*, 117 S. Ct. 181 (1996) (examining the application of the true conflict test); *supra* notes 82-93 and accompanying text (discussing the *Hartford Fire* decision and the true conflict test).

180. *See supra* notes 94-103 and accompanying text.

181. *See* Ashai Metal Indus. v. Superior Court, 480 U.S. 102, 113 (1987).

182. *See supra* notes 31-36 and accompanying text (discussing the purposes articulated by Congress in enacting Helms-Burton).

183. *See supra* notes 35-36 and accompanying text (examining the purposes and goals of the Helms-Burton Act).

184. *See* § 301(8), 110 Stat. at 814 ("The international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment from the use of wrongfully confiscated property . . . "); *see also* Travieso-Diaz, *supra* note 16, at 660-64 (explaining that compensation for expropriated property has not been provided to U.S. citizens by Cuba).

185. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316-21 (1945); *see also supra* notes 114-20 accompanying text (discussing the factors considered under the "sufficiency of contacts" prong of the minimum contacts test).

2. The Second Prong: Sufficiency of Contacts

A majority of the lawsuits brought under Helms-Burton will be based on general jurisdiction, rather than specific jurisdiction, because most of the trafficking activities under Title III of Helms-Burton will not "arise from" or "relate to" the defendants' activities within the United States.[186] The foreign defendant's trafficking activities that give rise to the cause of action under Helms-Burton will most likely occur abroad, either in Cuba, another foreign nation, or an international market.[187] As such, a United States court considering a Helms-Burton lawsuit must determine whether the foreign defendant has "continuous and systematic" contacts with the United States.[188]

As previously discussed, general jurisdiction has a higher minimum contacts threshold than specific jurisdiction.[189] The defendant's contacts do not need to be within the particular boundaries of the forum of the United States district court exercising jurisdiction.[190] The court instead will examine the defendant's contacts anywhere within the territorial boundaries of the United States.[191] Today, in determining general jurisdiction, courts examine whether the nonresident or foreign defendant has

186. *See* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984); *see also supra* notes 121-30 (discussing the differences between general and specific jurisdiction). If indirect trafficking violations are interpreted to the fullest extent, however, it is possible that U.S. banks, commodity traders, or other financial or broker entities that receive proceeds from direct trafficking profits, may be haled into a U.S. federal court under specific jurisdiction.

187. *See supra* notes 40-42 and accompanying text (explaining the Helms-Burton Act's definition of "trafficking").

188. *See Helicopteros*, 466 U.S. at 414 n.9. Under the expropriation exception of the FSIA, a lesser standard of sufficiency of contacts is applied than normally allowed under the traditional due process standard. *See* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 712-13 (9th Cir. 1992) (holding that under the expropriation exception of the FSIA, a foreign hotel's acceptance of U.S. credit cards and traveler's checks were sufficient contacts with the United States).

189. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445-48 (1952). There has been speculation that litigation under Helms-Burton might resurrect the use of quasi-in-rem jurisdiction. The only role of property in a quasi-in-rem proceeding is to provide the basis for bringing the defendant into court by attachment of the defendant's property to ensure enforcement of a judgment. The rationale for a quasi-in-rem proceeding is that the wrongdoer should not be able to avoid payment of obligations or debts by removing its assets to a location not subject to the exercise of personal jurisdiction. *See* Shaffer v. Heitner, 433 U.S. 186, 207-08 (1977) (holding that property can be used or applied in a minimum contacts analysis but is insufficient, alone, for establishing jurisdiction).

190. *See Helicopteros*, 466 U.S. at 414-16.

191. *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490 (1983) (explaining that Congress integrated a general jurisdiction requirement into the FSIA to protect foreign defendants from unfair exercises of jurisdiction by U.S. courts); *see also supra* notes 126-29 (discussing the factors U.S. courts used to analyze "continuous and systematic contacts" to determine the valid exercise of general jurisdiction).

a regular place of business in the United States, is licensed to do business in the United States, or has other "continuous and systematic contacts" with the United States.[192]

If a foreign company is charged with trafficking under Title III, it will be subject to general personal jurisdiction if the company, or its parent, affiliates, or subsidiaries has a place of business, or other assets, within the United States.[193] It will also be subject to general personal jurisdiction if the company engages in regular commercial transactions within the United States.[194] Thus, Helms-Burton's minimum reach will cover foreign persons or companies that have either an actual presence or ascertainable assets, within the boundaries of the United States, or an implied presence in the United States through the presence of a parent corporation, subsidiary, or affiliate.[195]

a. Extending General Jurisdiction to Reach Certain Defendants

If a foreign company does not have such a presence within the United States, United States courts may still attempt to exercise general personal jurisdiction if the foreign company has other continuous and systematic contacts with the United States.[196] In this situation, courts may utilize

192. *See supra* note 129 (providing cases that apply various tests for determining the valid exercise of general jurisdiction).

193. *See* City of Phila. v. Morton Salt Co., 289 F. Supp. 723, 725 (E.D. Pa. 1968) (holding that a foreign corporation is subject to jurisdiction by virtue of its U.S. distributor when it can be shown that the foreign corporation participated in the distributor's business decisions); *see also* Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CAL. L. REV. 1, 8-14 (1986) (examining due process issues that arise from the exercise of personal jurisdiction over parents or subsidiaries by virtue of the parent-subsidiary relationship).

194. *See supra* notes 126-29 (discussing the requirements for general jurisdiction).

195. *See* Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1330-31 (9th Cir. 1984) (assessing the sufficiency of contacts to determine whether such contacts are "continuous and systematic"); Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 534 (S.D. Tex. 1994) (stating the factors used in general jurisdiction analysis) (citing *Helicopteros*, 466 U.S. at 416); *see also* Debra Windsor, Comment, *How Specific Can We Make General Jurisdiction: The Search for a Refined Set of Standards*, 44 BAYLOR L. REV. 593, 594-603 (1992) (discussing the history of general jurisdiction and the early application of the "continuous and systematic" test); *supra* notes 126-29 and accompanying text (discussing the exercise of general jurisdiction in the United States).

196. *See* Payne v. Motorists' Mut. Ins. Co., 4 F.3d 452, 455 (6th Cir. 1993) (creating a three part test for personal jurisdiction when the defendant does not have continuous and systematic contacts with the forum). Several U.S. district courts have found sufficient contacts exist with the United States when foreign defendants conduct business through the U.S. telephone and mail systems. *See* Chisholm & Co. v. Bank of Jamaica, 643 F. Supp. 1393, 1401-02 (S.D. Fla. 1986) (holding the exercise of personal jurisdiction valid when a foreign corporation merely negotiated and obtained the services of a U.S. corporation "through the use of the United States mail and phone systems," and agreed to pay for those services in the United States); Meadows v. Dominican Republic, 628 F. Supp. 599,

factors in their personal jurisdiction analysis similar to those articulated by the Second Circuit in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*.[197]

Using four factors to guide their analysis of the sufficiency of the defendant's contacts, the United States court first "must examine the extent to which the defendants availed themselves of the privileges of American law."[198] Involuntary contacts do not satisfy the minimum contacts test.[199] Thus, a Helms-Burton defendant's contacts with the United States must be voluntary to satisfy due process;[200] the defendant must have "purposely availed" itself of the benefits and protections of United States law.[201] A defendant that does not have any contact with the United States cannot be sued under Title III for merely being involved in, or tangentially related to, transactions in Cuba that are related to trafficking

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604-08 (N.D. Cal. 1986) (holding the sufficiency of contacts requirement was satisfied by foreign defendants who negotiated and obtained services of American businessmen "through use of United States mail and telephone systems and agreeing to pay [for those services] in U.S. dollars").

Recently, a U.S. federal district court held that a foreign defendant's creation of a corporate advertisement on the World Wide Web of the Internet was also a sufficient contact with the United States, when persons in the United States accessed the foreign corporations web site. *See* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1338, 1344 (E.D. Mo. 1996) (upholding the exercise of personal jurisdiction based on contacts with the United States through the internet).

197. 647 F.2d 300, 314 (2d Cir. 1981) (assessing the sufficiency of the contacts to determine if such contacts are "continuous and systematic").

198. *Texas Trading*, 647 F.3d at 314-15; *see also supra* notes 150-51 and accompanying text. Application of the second factor, where a court may examine the extent to which litigation in the United States would be foreseeable to persons engaged in "trafficking" of expropriated property in Cuba would not really be at issue since the statute requires that a person must "knowingly and intentionally" be engaged in trafficking activities in order to be exposed to liability. Given the widespread publicity and international reaction to Helms-Burton, most foreign companies in Cuba have attempted to determine if they may be exposed to Title III liability for their activities in Cuba. It may be argued, however, that foreign defendants relied on either the "blocking legislation" of their sovereign government or of Cuba to exclude them from entering United States courts, and therefore, maintained that it was not foreseeable for them to litigate under Helms-Burton in the United States.

199. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958) (noting that unilateral activity by one party does not impute contacts on the other party); *see also supra* notes 113, 117-18 and accompanying text (examining the reasonableness and sufficiency of contacts factors used in personal jurisdictional analyses).

200. *See Hanson*, 357 U.S. at 253 (stating that a defendant must take affirmative action to avail itself of the privilege in conducting activities in the United States forum); *see also supra* note 115 and accompanying text (discussing that contacts with the United States must be voluntary to satisfy due process).

201. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295-97 (1980) ("[T]he defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."); *see also supra* note 117 and accompanying text (explaining the purposeful availment requirement).

of expropriated American property because contacts with former American property in another country cannot be construed as voluntary contacts with the United States.[202] In many cases, to find sufficient contacts, the United States plaintiff would have to pierce the corporate veil because United States affiliates of foreign companies doing business in the United States are likely to be different from the sister foreign subsidiary doing business with Cuba.[203]

Under the third factor of the *Texas Trading* analysis, a court must examine the inconvenience to the defendants of litigating in the United States.[204] Like the reasonableness analysis under the first prong of the minimum contacts test, a court could focus on the burdens placed on defendants and the international comity complications created by foreign blocking statutes.[205] In particular, a court may focus on the consequences faced by a foreign defendant, such as suffering civil penalties and sanctions with its home country under blocking statutes if it submits to the jurisdiction of a United States court or settles with a United States plaintiff or the United States government.[206]

Under the fourth factor, a court must examine the countervailing interest of the United States in hearing the suit.[207] Under *Hartford Fire*, a court needs to examine only whether the assertion of jurisdiction would be in direct conflict with a foreign law.[208] Once again, the analysis shifts

202. *See Hanson*, 357 U.S. at 253 (explaining that a nonresident defendant cannot be held accountable for its involuntary contacts through the unilateral activities of another resident entity).

203. *See* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL §§ 3.01-.16 (1996) (surveying federal law regarding piercing the corporate veil); Daniel G. Brown, Comment, *Jurisdiction Over a Corporation on the Basis of the Contacts of an Affiliated Corporation: Do You Have to Pierce the Corporate Veil?*, U. CIN. L. REV. 595, 598-616 (1992) (reviewing the legal standards governing piercing the corporate veil and the application of these principles to the assertion of jurisdiction over affiliated corporations).

204. *See* Texas Trading & Milling Corp. v. Republic of Nigeria, 647 F.2d 300, 314-15 (2d Cir. 1981) (stating that it is not inconvenient for a Nigerian party engaged in international business transactions with a U.S. corporation to litigate in the United States because "[e]very modern transnational commercial contract presents problems of adjudicatory cost"); *see also supra* notes 148-50 (stating the sufficiency of contacts test the Second Circuit created in *Texas Trading*).

205. *See supra* notes 94-103 and accompanying text (explaining foreign blocking statutes).

206. *See supra* notes 94-96 (describing the different types of foreign blocking statute mechanisms).

207. *See Texas Trading*, 647 F.2d at 314-15 (noting that Congress expressed its intent under the FSIA to provide Americans with "access to the courts" and stating that a U.S. forum has a "manifest interest in providing effective means of redress for its residents").

208. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798-99 (1993) (stating that since subject matter jurisdiction was valid "[t]he only substantial question in this litigation is whether 'there is in fact a true conflict between domestic and foreign law.'").

to balancing the interests of the opposing nation's foreign blocking legislation with the interests of the United States in adjudicating the lawsuit. It is apparent that the due process limitations intertwined in the *Hartford Fire* "direct conflict" standard complicate the "reasonableness" and "sufficiency of the minimum contacts" determinations necessary for a United States court to validly assert jurisdiction over a foreign defendant.[209]

b. Due Process Arguments to Counter Assertions of Personal Jurisdiction Based on Ancillary Trafficking Violations

Foreign defendants haled into a United States court should vigorously oppose broad extensions of Title III liability based on trafficking violations for activities stemming from, or not directly related to, expropriated property or parent-subsidiary affiliations that allegedly profit from trafficking activities. For lawsuits alleging indirect trafficking violations, due process arguments should be advanced by a Helms-Burton defendant to contest the assertion of personal jurisdiction by a United States federal court.[210] If the Helms-Burton defendant is engaged in or exposed to trafficking for indirect activities, or is a parent company profiting from indirect trafficking of its subsidiary, it may successfully challenge the assertion of personal jurisdiction.[211] These due process arguments may be advanced under both the reasonableness prong and the sufficiency of contacts prong of the minimum contacts test.[212] These arguments may be successful even if the subsidiary or parent has business locations or assets within the United States or is otherwise deemed to have continuous and

209. *See id.* at 796-98. These due process arguments, based on lack of minimum contacts, would be similar to the challenges against lawsuits brought under the commercial activities exception of the FSIA. *See* Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivanos, 712 F. Supp. 383, 390 (S.D.N.Y. 1989) ("Congress did not have the authority to override the constitutional due process constraints underlying personal jurisdiction when it drafted the FSIA."); *see also supra* note 49 (discussing the potential parallels between litigation arising under Title III of Helms-Burton and litigation brought under the commercial activities exception of the FSIA).

210. *See supra* notes 105-30 and accompanying text (examining the due process protections afforded foreign defendants through the requirements for U.S. courts' valid exercise of personal jurisdiction).

211. *See* Kuenzle v. HTM Sport-Und Freizeitgerate, 102 F.3d 453, 455-60 (10th Cir. 1996) (holding that a foreign manufacture lacked sufficient contacts with the United States and was not subject to the exercise of either specific or general jurisdiction by the U.S. forum); *see also supra* notes 174-75 (providing cases where courts declined to exercise personal jurisdiction over foreign defendants based on their insufficient contacts with the United States).

212. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316-19 (1945); SEC v. Knowles, 87 F.3d 413, 417-19 (10th Cir. 1996) (analyzing a defendant's sufficiency of contacts with the United States and upholding the exercise of personal jurisdiction); *see also supra* notes 110-15 and accompanying text (explaining the *International Shoe* minimum contacts analysis).

systematic contacts with the United States to satisfy the general jurisdiction requirement.[213]

C. True Conflict Limitations on the Extraterritorial Reach of the Helms-Burton Act: Foreign Blocking Legislation

Without more articulable and coherent standards to guide the legal analytical framework developed to determine the valid exercise of extraterritorial jurisdiction, the *Hartford Fire* true conflict test will surely become the focus of future controversy. The reexamination of the true conflict test is even more probable since the use of foreign blocking legislation is increasing in response to United States extraterritorial legislation like Helms-Burton.[214] Lawsuits brought in United States courts under Helms-Burton will face many complications created by foreign blocking legislation created to blunt the extraterritorial reach of United States law.[215]

Canadian blocking statutes, originally enacted in 1992 and recently expanded to counter Helms-Burton, provide the most vivid example.[216] The Foreign Extraterritorial Measures (United States) Order (FEMO) directs Canadian businesses and their officers not to comply with an ex-

213. *See* Tubular Inspectors, Inc. v. Petroleos Mexicanos, 977 F.2d 180, 183-86 (5th Cir. 1992) (analyzing whether a foreign defendant had requisite minimum contacts with the United States to exercise subject matter jurisdiction under the FSIA, and holding that the defendant's unrelated commercial contacts were "sufficiently isolated" to deny subject matter jurisdiction); Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 533-34 (5th Cir. 1992) (holding that a foreign defendant did not have sufficiently related commercial activities to satisfy the jurisdictional requirements to exercise subject matter jurisdiction under the commercial activities exception of the FSIA); Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 200-04 (5th Cir. 1984) (holding that the commercial activities exception of the FSIA did not apply and that subject matter jurisdiction was lacking because there was an insufficient nexus between the plaintiff's grievance and the foreign state's commercial activity within the United States).

214. *See Hartford Fire*, 509 U.S. at 778-79; *see also* Dam, *supra* note 1, at 290-92 & nn.10-11 (examining the *Hartford* decision in the context of an international policy decision and how domestic economic policies are increasingly conflicting with international relations due to the accelerated integration of the global economy); *supra* notes 95-98 and accompanying text (surveying the application of blocking statutes).

215. *See EU Approves Blocking Legislation in Reaction to Helms-Burton Act*, 13 Int'l Trade Rep. (BNA) No. 13, at 1243 (July 31, 1996) (discussing the provisions of the European Commission's blocking legislation aimed at preventing European companies from complying with the Helms-Burton Act); *see also supra* notes 94-103 and accompanying text.

216. *See* Foreign Extraterritorial Measures Act, R.S.C. ch. F-29, §§ 1-6 (1992)(Can.), amended by 130 C. Gaz. No. 2, 610, 611-15 (1996); *see also* Douglas H. Forsythe, *Canada: Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the U.S. Helms-Burton Act*, 36 I.L.M. 111, 112-14 (1997) (explaining the Canadian policy rationales for its blocking legislation aimed at countering Helms-Burton, and summarizing its main provisions).

traterritorial measure of the United States affecting trade or commerce between Canada and Cuba.[217] FEMO states that any United States legislation that is likely "to prevent, impede or reduce trade or commerce between Canada and Cuba" will be construed as an extraterritorial measure of the United States.[218] FEMO may seriously test the *Hartford Fire* true conflict standard.[219]

Under the *Hartford Fire* analysis, in the absence of a true conflict between domestic and foreign law, the extension of extraterritorial jurisdiction can be validly assumed.[220] While extraterritorial subject matter jurisdiction may be validly assumed because of express congressional intent, the scope of the application of Helms-Burton is not clear, and expansive application of its extraterritorial reach cannot be assumed. The true conflict standard may be open to two interpretations. Under the first interpretation, a true conflict may exist only if the foreign sovereign mandates a particular activity.[221] Under the second interpretation, a true conflict exists when a foreign defendant cannot simultaneously comply with the laws of his own country and those of the United States.[222]

1. "Foreign Sovereign Compulsion" Direct Conflict Interpretation

Under the foreign sovereign compulsion interpretation, FEMO would not be considered a true conflict with Helms-Burton because the Canadian law does not mandate that Canadian companies engage in commercial activities in Cuba that are considered trafficking violations under Helms-Burton.[223] Under this interpretation, a true or direct conflict does not exist because a Canadian company has the choice of engaging in commercial activities that are Helms-Burton trafficking violations.[224]

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217. *See* R.S.C. ch. F29 §§ 3-6, at 612-13 (requiring Canadian corporations to report attempted extraterritorial assertions of United States law related to trade with Cuba and prohibiting such corporations from attempting to comply with any U.S. extraterritorial measure).

218. *Id.* at 612.

219. *See* Fairley, *supra* note 20, at 30-32 (analyzing FEMO within the context of the direct conflict standard).

220. *See Hartford Fire*, 509 U.S. at 797-99.

221. *See* Lowenfeld, *supra* note 90, at 45-47 (examining the Supreme Court's two different interpretations of the true conflict standard).

222. *See Hartford Fire*, 509 U.S. at 798-99; *see also* Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 846 n.5 (9th Cir.), *cert. denied*, 117 S. Ct. 181 (1996) (examining the application of the direct conflict test).

223. *See supra* note 91 (providing an example of a sovereign compulsion defense scenario under Helms-Burton).

224. *See* Lowenfeld, *supra* note 90, at 45-48 (explaining the *Hartford* majority's position that no true conflict exists "where a person subject to regulation by two states can comply with the laws of both").

2. *"Inability to Simultaneously Comply" True Conflict Interpretation*

Under the inability to simultaneously comply interpretation, a true conflict exists when a foreign defendant cannot simultaneously comply with the laws of his own country and those of the United States.[225] FEMO directs Canadian businesses and their officers not to comply with an extraterritorial measure of the United States regarding any trade or commerce between Canada and Cuba.[226] Under the plain language of Title III, and the purposes articulated by Congress, it is apparent that Helms-Burton is an extraterritorial measure designed to deter commerce between Canada and Cuba.[227] Based on this language, Helms-Burton could be construed to be a true conflict with the Canadian FEMO law.

Unless this conflict has a demonstrably severe negative impact upon United States foreign relations with Canada, however, such a conflict probably will not be considered substantial enough for a United States court to refuse to exercise extraterritorial jurisdiction.[228] On the other hand, if this type of conflict is considered severe under this interpretation of the *Hartford Fire* true conflict test, extraterritorial jurisdiction cannot be asserted by United States courts upon Canadian citizens or businesses conducting transactions in Cuba that are considered to be trafficking.[229]

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225. *See Hartford Fire*, 509 U.S. at 799 (explaining that the defendants did not argue that British law mandated a particular action prohibited by U.S. law, and therefore, no true conflict existed to bar the assertion of extraterritorial jurisdiction). For example, assume that a French company voluntarily engages in commercial activities in Cuba that violated Helms-Burton and the company is sued by the former U.S. owner of the property. France has enacted various blocking statutes that bar recognition of the extraterritorial assertion of jurisdiction by U.S. courts. The French company, therefore, would be considered unable to simultaneously comply with both the French blocking statute and U.S. law, and therefore a true conflict would exist under this interpretation.

226. Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1992)(Can.), amended by 130 C. Gaz. No. 2, 610, 611-15 (1996).

227. *See Hartford Fire*, 509 U.S. at 611-15; *see also* Fairley, *supra* note 20 at 30-32 (analyzing FEMO in conjunction with the Helms-Burton Act and concluding that a direct conflict does exist).

228. *See* Société Nationale Industrielle Aerospatiale v. United States District Court for the S. District of Iowa, 482 U.S. 522, 543-47 (1987) (stating that a foreign nation's blocking statute precluding disclosure of evidence does not deprive a U.S. court of the power to order a party subject to its jurisdiction to produce evidence, even though the act of production may violate the foreign blocking statute); *see also supra* notes 102-03 and accompanying text (examining the Court's treatment of foreign blocking statutes and interpretation of its true conflict standard).

229. *See* Fairley, *supra* note 20, at 30-32 ("A U. S. federal court should find . . . [that the Canadian blocking legislation] creates a direct conflict precluding compliance by a Canadian defendant with any Title III remedy.").

3. *The Future of the True Conflict Standard and Helms-Burton Blocking Statutes*

Mexico, Cuba, and the European Union have enacted blocking legislation aimed at vitiating the extraterritorial reach of Helms-Burton.[230] These blocking statutes may neutralize, or at least seriously hinder, Helms-Burton's effect on the major trading partners of the United States.[231] If litigation under Helms-Burton proceeds, the Supreme Court may eventually be called upon to re-evaluate its current extraterritorial jurisdictional analysis. Confronted with the expansive extraterritorial reach of Helms-Burton, the Supreme Court will need to redefine the true conflict standard to alleviate the confusion resulting from extraterritorial legislation litigation.

IV. Using an Effects Analysis to Determine the Limitations of Extraterritorial Legislation: *Timberlane* Revisited

While some legal principles and guidelines have been established to determine whether United States legislation was intended to have an extraterritorial effect, no comprehensive principles have been developed to determine the limitations on the exercise of express extraterritorial legislation.[232]

The "true conflict" standard established in *Hartford Fire* will not suffice because it lacks an articulable definition or guidelines for lower courts to determine whether a true conflict actually exists.[233] Assuming the Castro regime remains in power and that Congress does not repeal Helms-Burton, the Supreme Court may be given the opportunity to resolve the confusion and bring United States courts out of the fog created

230. *See* Jorge A. Vargas, *Mexico: Act To Protect Trade and Investment from Foreign Norms that Contravene International Law*, 36 I.L.M. 133, 134-43 (1997) (explaining Mexican responses to U.S. extraterritorial measures and providing the text of the Mexican legislation); *European Union: Council Regulation (EC) No. 2271/96, Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country*, 36 I.L.M. 125 (1997) (providing the text to the European blocking legislation enacted specifically in response to Helms-Burton).

231. *See European Commission Calls Cuba Bill "Clear" Violation of International Law*, 13 Int'l Trade Rep. (BNA) No. 10, at 368 (Mar. 6, 1996) (noting the EU's criticism of the Helms-Burton Act); NAFTA Designates Confer on Complaint Against Helms-Burton Under Chapter 20, 13 Int'l Trade Rep. (BNA) No. 27, at 1093-94 (July 3, 1996) (noting that Canada and Mexico are contesting Helms-Burton and arguing that it violates the North American Free Trade Agreement (NAFTA)).

232. *See supra* Part II (detailing the legal principles used to address the application and limitations of extraterritorial assertions of subject matter and personal jurisdictions).

233. *See supra* notes 75-80 and accompanying text (explaining the *Timberlane* court's consideration of international comity).

by its past decisions addressing jurisdictional analysis and extraterritoriality. If Title III is not implemented in the near future, the Court may be called upon to address these issues arising under similarly broad extraterritorial federal legislation.[234]

As a possible solution to the extraterritorial jurisdiction morass, United States courts could employ a variation of the effects doctrine. Although originally established to determine whether United States law could have an extraterritorial effect when congressional intent is not clear,[235] United States courts could utilize an effects doctrine to determine the limitations on the extraterritorial reach of United States law when congressional intent for an extraterritorial effect *is clear*, but the actual scope of the legislation's extraterritorial reach and the limitations to its application are not clear.[236] The three-pronged effects test articulated in *Timberlane* could be used as a framework to determine the actual scope and limitations upon extraterritorial legislation, even when the extraterritorial intent of such legislation is already clear.[237]

Under the first prong, the foreign conduct must impact United States imports, exports, or interstate commerce in order to establish that it is appropriate for United States courts to exercise jurisdiction over foreign activities.[238] The second prong entails a determination of whether the effect presents a significantly large and demonstrated injury resulting from the conduct sufficient to extend the extraterritorial reach of the legislation.[239] Under the third prong, the court would weigh foreign policy and international comity considerations in determining whether it should find jurisdiction.[240] In the end, however, the court must balance and

234. *See supra* note 13 (providing examples of current extraterritorial legislation).

235. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) (stating the basic analytic framework for asserting extraterritorial jurisdiction when congressional intent is not clear, which later became know as the "effects test"); *see also supra* notes 60-71 and accompanying text (discussing the *Alcoa* effects doctrine).

236. *See supra* notes 60-62 (discussing the courts' current application of the effects test). Of course, this could set the Supreme Court and Congress on a collision course, and the Court historically has tried to avoid such conflicts involving foreign affairs. *See* Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805, 806-07 (1989) (explaining the practical reasons for courts to defer to the executive and legislative branches in foreign affairs).

237. *See* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613-15 (9th Cir. 1976); *see supra* note 81 (providing other Circuits that created a similar test); *see also supra* notes 60-71 and accompanying text (discussing the effects doctrine and its application).

238. *See Timberlane*, 549 F.2d 613-15.

239. *See id.*; *see also* Gregorian v. Izvestia, 871 F.2d 1515, 1527 (9th Cir. 1989) ("[M]ere financial loss suffered by a plaintiff in the United States as a result of the action abroad of a foreign state does not constitute a 'direct effect.'").

240. *See Timberlane*, 549 F.2d at 609. The court recognized the significance of weighing the "regard for comity and the prerogatives of other nations" in determining the limita-

weigh the considerations of all three prongs; considerations under the third prong cannot be determinative standing alone.[241]

In *Timberlane*, the court recognized the significance of weighing the "regard for comity and the prerogatives of other nations" in determining the limitations upon the extraterritorial reach of United States antitrust laws.[242] It is not suggested that the judiciary actively participate in foreign affairs; rather United States courts should merely be cognizant of the international repercussions that may result from its decisions.[243] Courts should be allowed to weigh international comity factors against the determinations made under the first two prongs of the effects analysis.

The court in *Timberlane* found that limitation of the exercise of jurisdiction would be appropriate when "the interests of the United States are too weak and the foreign harmony incentive for restraint [of jurisdiction] too strong."[244] Using this statement as a guideline, courts should, at a minimum, limit refusal to exercise jurisdiction to situations where it is plain that the exercise of jurisdiction over the foreign defendant would be outrageously offensive. Jurisdiction should be limited also when the actual interests of the United States are negligible or are demonstrably outweighed by the interests of the foreign defendant's country.

Alternatively, if international comity analysis as a threshold determination to determine the validity of exercising subject matter jurisdiction is rejected, courts should actively employ international comity considerations in their personal jurisdiction analysis.[245] These considerations could be analyzed under both the reasonable prong and sufficiency of contacts prong of the minimum contacts framework. The primary purpose of such analyses is to provide foreign defendants with constitutional due process protection from unfair assertions of jurisdiction.

V. Conclusion

With the continued passage of increasingly bold extraterritorial legislation, the judiciary will be less and less able to maintain a passive role in

tions upon the extraterritorial reach of U.S. antitrust laws. *Id.* at 612. *See generally* McKinnon, *supra* note 79 (examining the history and development of extraterritorial analysis and discussing the application and limitations upon comity factors in such analyses).

241. *See supra* notes 110-47 and accompanying text (examining *International Shoe* and the evolution of the minimum contacts analysis).

242. *Timberlane*, 549 F.2d at 612.

243. *See supra* notes 72-82 and accompanying text (explaining international comity considerations).

244. *Timberlane*, 549 F.2d at 609.

245. *See supra* note 87 and accompanying text (explaining that the *Hartford Fire* majority implicitly stated that international comity considerations could be addressed in a court's personal jurisdiction analysis).

foreign affairs. Helms-Burton may finally provide the Supreme Court with an opportunity to address the limits of the extraterritorial reach of United States law. If Title III is enforced and cases are filed, the Supreme Court will need to confront the limits of extraterritorial legislation and to clarify existing legal standards by setting and applying a coherent analysis to determine the constitutional and legal limitations of Helms-Burton. While Title III actions may never come before the courts, the Act represents a recent trend whereby United States legislation has significant and direct extraterritorial reach. Furthermore, the use of extraterritorial legislation by the United States continues to expand as the international economy becomes more integrated and other foreign policy options become less viable. Sooner or later, the Supreme Court will be called upon to provide a coherent legal framework for future extraterritorial legislation promulgated by Congress.

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